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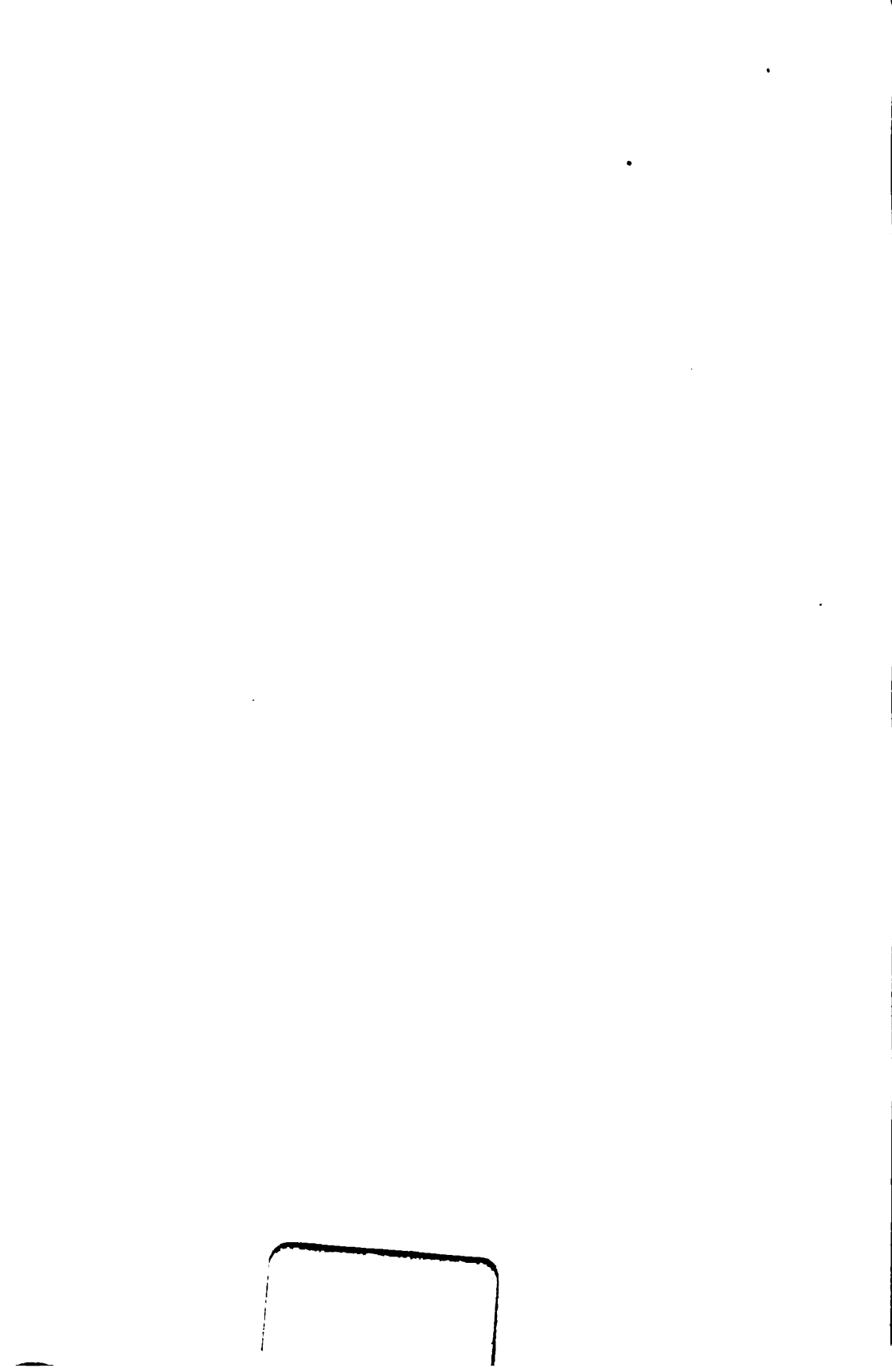

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# FOREWORD

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## Volume 6

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## 1897

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Buffalo, N. Y.
November 1962

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It will be noted that there is a duplicate series of pages with different contents, pages 229-250 inclusive. Evidently, the printer made an error in setting up page numbers as Issue No. 9 contains pages 229-250 inclusive and Issue No. 10 contains pages 229-256 inclusive.

# MICHIGAN LAW JOURNAL.

A MAGAZINE DEVOTED TO THE DISCUSSION OF MATTERS OF INTEREST TO LAWYERS OF THE STATE OF MICHIGAN.

VOLUME VI.

MICHIGAN LAW JOURNAL COMPANY,
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# MICHIGAN LAW JOURNAL.

VOL. VI. JANUARY, 1897. No. 1

## *MINUTES OF THE FOURTH ANNUAL MEETING OF THE ASSOCIATION OF JUDGES.*

JUDGE FRED. H. ALDRICH.

The Association of Judges of Michigan met in its fourth annual session in Judge Frazer's court room in the City Hall in Detroit, at two o'clock in the afternoon of December 29th, 1896.

The meeting was called to order by the president, Hon. Sherman B. Daboll.

On motion of Judge Eldridge the reading of the minutes of the last meeting was dispensed with.

The president began the exercises of the meeting with his annual address which was listened to with great interest by the members and visitors present.

By much care and painstaking he had gathered some very interesting statistics of the work done in the various courts of the state during the year of 1895. From the facts disclosed by an examination of these statistics he showed that only one-eighth of the cases heard in the circuit courts during that time had been appealed to the supreme court and only one out of twenty had been reversed.

Thus the circuit courts are courts of last resort in eighty-eight per cent. of all cases tried before them, and their judgments remain undisturbed in ninety-five per cent. of all such cases.

He said that few people had any adequate idea of the number of criminal cases commenced in the state during that year. There

were 23,116 cases commenced in which there were 17,957 convictions. 2,263 of these cases were tried in the circuit courts.

The president then discussed some proposed changes in our practice.

He has had considerable experience under the code practice as exemplified in the state of New York and does not believe that we should adopt a code. However he is not perfectly satisfied with our practice but believes in evolution instead of revolution. He said that a party having a cause to be litigated could follow it through our courts in less time, taking fewer steps in legal proceedings, and meeting with less technicalities than in almost any other state in the Union.

He proposed that our laws be amended to give the court the right to refer commercial cases to a referee to hear the testimony and compute the amount due; to limit the right of appeal from justice courts to cases involving fifty dollars or more; and to enlarge the judicial circuits consolidating several into one, the judges thereof to hold court in the several counties comprising such enlarged circuits in rotation.

The president's address was followed by a very able paper by Judge Smith of Hastings on "The Law and Sex Relations." He called attention to the inadequate punishment provided in cases of adultery and seduction, and maintained that bastardy should be treated as a crime and severely punished, where the father of an illegitimate child failed to honorably discharge his duties toward the child and its mother.

He supported his contentions with very forceful and convincing arguments.

He called attention to a number of obsolete statutes in relation to marriage that in no human probability would ever be violated, and said that their place might well be occupied by laws prohibiting marriages that are likely to be consummated but which ought to be forbidden. He said that infants who were not considered in the eyes of the law capable of making ordinary contracts, should not be permitted to enter into these most solemn obligations imposed by marriage and that inebriates should not be allowed to marry at any age. This paper was followed by a very spirited discussion in which president Daboll and Judges Hosmer, Donovan and Frazer participated.

Upon motion of Judge Grove the association proceeded to the discussion of questions placed upon the program at the suggestion

of members of the association. Chief Justice Long said that the question had been discussed between his colleagues and himself of omitting any formal opinion or discussion of the law points involved in certain cases that were affirmed involving no new questions but ruled by prior decisions of our supreme court. He said that this would relieve the court of much unnecessary labor and give more time for the examination of other causes. That this plan was favored by the justices of the supreme court but that they did not wish to inaugurate so radical a change without first ascertaining that it met with the approval of the bench and bar of the state.

Several members of the association spoke in favor of this proposition.

Remarks were made upon the two questions considered together "Should we adopt code practice" and "Can the desired improvements in legal procedure be made while retaining the common law practice" by Mr. Justice Long and Judges Grove, Hosmer and Speed.

Judge Grove spoke in favor of a code, providing that it could be prepared by the supreme court or by a commission composed of able lawyers appointed by the supreme court and that it should be surrounded with safe guards against unnecessary amendments.

A majority of the members who spoke favored our present system with certain needed improvements.

The meeting was thereupon adjourned to ten o'clock Wednesday morning, December 30th.

On reassembling Wednesday morning Judge Pealer of Three Rivers presented a paper on "The new compilation and digest provided for in Act 268 of Public Acts of 1895." He urged the members of the association to give their earnest support to the work being compiled by Lewis M. Miller, and spoke in high terms of the ability of Mr. Miller and the thoroughness of his work upon this compilation.

Judge Frazer suggested that it might not be best to press forward the completion of the new compilation until after the close of the coming session of the legislature.

The ssociation next took up the discussion of the many interesting questions presented in the president's address.

Remarks were made upon these questions by Judges Frazer, Hosmer and Riley.

The association then passed to the consideration of the last question upon the program: "Is the Judge responsible where there is a known failure in the enforcement of the law?"

This question called out a warm discussion which was participated in by Judges Pealer, Lillibridge, Maxwell, Frazer, Clement Smith and Russel.

The prevailing opinion was to the effect that a judge should not be in any way interested in the initiation of legal proceedings, either civil or criminal, that were to be ultimately brought before him, but that it was his duty if it came to his knowledge that there were open and notorious violations of the law that the ordinary methods did not reach, to call a grand jury to investigate the alleged offenses and the conduct of the officers entrusted with the prosecution of criminal cases. And that it was the duty of the judge, while leaving all questions of fact to be decided independently by the jury, to endeavor to have all issues brought into his court determined upon their merits and not to have the ends of justice defeated by technical objections.

The general discussion being closed a communication was read by the secretary from Geo. E. Ranny, Esq., secretary of a committee of the State Medical Society, in regard to the necessities and advantages of an accurate registration of births and deaths.

Upon motion the communication from Mr. Ranny was received and placed on file.

Upon motion of Judge Carpenter the association adopted the resolution proposed in the communication of Mr. Ranny, leaving out the preamble and omitting the second clause of the resolution.

The resolution as adopted reads as follows: Resolved, that the association of Judges of Michigan assembled at Detroit, December 30, 1896, respectfully petition the incoming legislature to enact a law providing for the accurate registration of all births and deaths that occur in the state.

The treasurer's report was received and adopted, showing the amount of funds on hand to be thirty-one dollars and thirty-eight cents.

By the unanimous vote of all members present the election of officers for the ensuing year resulted in the choice of Hon. Geo. S. Hosmer of Detroit for president, Hon. Victor H. Lane of Adrian for vice-president, and Hon. Clement Smith of Hastings for secretary and treasurer.

Upon motion the place of the next meeting was left open to be determined by the executive committee.

Upon like motion the date of the next meeting was fixed for Tuesday, December 28th, 1897, at 2 P. M.

Motion was made by Judge Lane to give a vote of thanks to the

MICHIGAN LAW JOURNAL for the many courtesies extended toward this association, which motion was carried by unanimous vote.

Upon motion of Judge Frazer a resolution was adopted that the executive committee provide some plan whereby the expressions and determinations of this association may be published and brought to the attention of the legislature.

Upon motion of Judge Lane it was resolved that this association respectfully submits to the legislature, soon to convene, the question of whether public interests do not demand that, except in the discretion of the circuit court upon application, no appeal shall be permitted from judgments rendered in justice courts where the amount involved or determined by the judgment does not exceed $50.00, and that it is the sense of this association that such legislation is in furtherance of the public weal.

A vote of thanks was extended by the association to the retiring officers for services rendered during their terms of office.

Thereupon the meeting of the association was adjourned without day.

## THE LAW AND SEX RELATIONS.

JUDGE CLEMENT SMITH.

Since I have been upon the bench of this state, there has no one thing been more prominent to me as a judge, and called for condemnation within my inner self, than the way in which the sex relations have been treated by the law of this state, and as the years go by, their injustice seems to me to be the more apparent. This is especially so regarding the punishment, if punishment it can be called, for the offense of bastardy. It is also apparent in the punishment of seduction and adultery.

The law of marriage, is also, in my judgment, framed so as to be in a large measure productive of what some people are pleased to call the greatest scandal of the state, viz.: its divorce system.

I shall say but little regarding the divorce law of the state, believing that in some measure it is necessary to relieve wronged parties from a tie more galling than death. It is very probable that its causes might be limited more than now, and some of its abuses remedied in past.

However, it is the open door through which many must pass to relieve themselves from the loose and insecure laws regarding the institution of marriage; and it is made larger, in my judgment, by the lowering of the general thought of the people regarding the marriage relation as evinced by the laws of the state regarding the relation of the sexes, and the punishment of the violation of their rights.

It will be conceded that the state has strength in comparison to the virtue in the homes of its citizens, it will be conceded that the stronger we can make the love of a home, and those within it, the higher we can raise the regard one has for his home, the stronger will be the citizenship which comprise the state. How, I ask, can it be expected that the general people who know its laws and see punishment meted out to the violation of the rights of a home to the

violation of its most sacred rights, not as great as to the man who steals a few paltry dollars in cash or property of another, or commits some crime in the catagory of assaults with intent, etc., can have the proper application of home from a legal standpoint. Can it be supposed for a moment that a person not having the highest regard for a home and its influence, will have that regard very greatly enhanced when he knows that the law of his state fixes the maximum of the punishment for adultery or seduction at one-fifth the maximum of the punishment for horse stealing and burglary. That, practically fixes no punishment at all to the man who brings into the world outside of the marriage relation a human life with all its possibilities for evil, taking into consideration the surroundings it so many times must have. Must it not follow that those who have a low conception of these relations, and the rights belonging to them, when they take into consideration what the state thinks of these violations, as evidenced by its laws, will conclude that they are supported in their views and will be the more apt by act and deed to sow the seed that brings to this state its harvest of out-casts and waifs, which it is called upon so often to care for.

If a man enters anothers home and seduces a wife or a daughter, and the wronged husband or father shoots him down as he would a dog, it is seldom that a jury convict for the homicide, and its acquittal receives very nearly a unaminous affirmance on the part of the public. If the man however escapes the righteous anger of the wronged husband or father, and is brought to the bar of justice for trial for his offense and convicted for this great wrong against the family of his neighbor, against society and morals, a wrong that to avenge it outside the pale of the law releases another from a life punishment for his murder, the law of the state says he may be punished for a term not exceeding three years in states prison. It seems to me there can be no escape from the conclusion, that the law in this case does not begin to measure up the seriousness of the offense by its punishment, and that were the punishment greater, there would be less of the commission of the offense, but greater than that in its public interest and welfare would be the sentiment backed up by the severity of the law, that the state through the correctment of law had raised its voice against the violation of the sacredness of home with no uncertain sound, and this in my judgment would have more to do towards uniting the forces of home to better lives and better living than any other element that is now being brought to bear to unify these forces in the best interest of the state.

It is no uncommon thing to hear the violations of the law against the rights of a home spoken of in a light manner, and is it any wonder when we take into consideration the punishment given these offenders under the law of the state.

I have often thought while on the bench of the comparison as to the seriousness of the trial of a case of bastardy as compared with a case of murder. Both as a rule attract attention and draw a crowd. As serious as is the trial of a man charged with the taking of human life, and sad as it many times is in its surroundings, I have never felt the solemnity and seriousness of such a crime any more keenly than I have the investigation of the parentage of a child, and to me there is no sadder surroundings in the trial of a law suit than to see before me a young girl holding in her arms the child she can never disown, and seeking to show who its father is.

In the one case if a man is convicted of taking human life, he may be sent to prison for life, in certain cases that must be his sentence, and in any event it means a term of years.

In the other case if the jury shall find that the man is the father of the child, begotten outside the marriage relations, a violation of the divine and statute law, he can be made to care for it, if he has any property, but if he hasn't, he can be kept a few months in jail, at the expense of the people, as for a contempt of court, then to be released to repeat the programme if he can find some one weak and yielding enough to get within his control.

It occurs to me that, if the law of the state was such that a man could be imprisoned for a term of years if convicted of this offense, and that this must follow unless by marriage he made reparation for this wrong against the state, or provided for the care of the child in such a way that it was not possible that it become a state charge, this offense would be less frequent than it now is; and it is no answer to this in my judgment that she is equally guilty with him, and that it is a mutual affair. She has the burden of maternity to carry. She has a shame she can not hide; she is practically an outcast in society and it is my observation that it is very seldom that she is equally guilty with him, and be that as it may, it is a menace against society that should be stopped by prompt, certain and severe punishment, and I feel sure it would be if dealt with in such a manner.

The law regarding marriage is in my judgment very deficient. The general public seem to have an impression that all laws in restraint of marriage are void, that the state has no right or author-

ity to pass a law that will in any way be a restraint upon marriage.

This is not true as the profession knows, and there are many laws upon the pages of the statutes of the state that impose a restraint and these are not confined to the matter of age, or the restraint of the very young from entering into this sacred relation.

It seeks to strike at evils with older persons. Persons mature in years, and when one reads carefully the law of this state regarding who may and who may not enter into the relation of marriage, and compares it with such laws, as in my judgment we ought to have to protect society from the wrongs done to it by ill advised marriages, it would occur to the ordinary mind that the state had within its midst a lot of people without mind or intelligence, entirely corrupt in the views of the ordinary conditions in life and ready to enter into the most disgusting relations, that could be conceived of.

Think for a moment of a statute of a state forbidding the marriage of a man to his grandmother or to his mother, or to his sister, or to his daughter, or the marriage of a woman to her grandfather, or to her father, or to her brother or her son.

Such a prohibition in the statute is entirely unnecessary, and one reads it with the thought that it is an insult to the intelligence and morals of the state, the thought of such a thing is repulsive and disgusting — and the space that the law occupies upon the statute could be better filled by a law, that would forbid marriages that are likely to happen, that do happen every day in the week, so many times to the great detriment of the state by the continuance of the relation long enough for the birth of one or more children, to be cared for so many times at the expense of the state.

In my judgment the law is not restricted enough regarding the marriage of those parties who are likely to marry, when their best interests and the best interests of the state are subserved by such restrictions.

That the state has power to control these matters can not be doubted. At least it assumes to do so by the law now upon the statute books, and the fault I find with it is that it does not go far enough, and it is not restrictive enough in its terms.

If it is wise to prohibit the marriage of men under eighteen years of age, and women under sixteen years of age, it is, in my judgment, much wiser to add at least three years to the age restriction in the case of a man, and five in the case of a woman.

My observation leads me to be strongly of the impression that this is young enough.

The law of the state treats people under twenty-one years of age as not capable of making contracts. They cannot enforce civil remedies in courts, nor have civil remedies enforced as against them, only as they are represented by guardians; and yet, they are permitted to enter this relation which should be life lasting, the most important of all the relations in life to themselves, and to the state, under this age, and at an age in which they are denominated under the law as infants. It seems to me the folly of this course is apparent, and the results of it are shown in the number of divorces which our court proceedings show.

I do not know how it may be with my brothers of the bench, but my experience has shown me that a large part of the divorces come from this class of marriages; and by far the divorces in greater number from which the public suffer come from this class. Marriage, while unlike an ordinary contract, is more important to the state than any other.

Parties can annul without the aid of a court the terms of an ordinary contract, but they can not do this in the case of marriage.

It has never been doubted that restriction may be placed upon parties regarding this relation. If restriction may be imposed regarding age, why may it not regarding other matters? Why can not the law say that a man before entering this relation shall have some business, or calling in which he will be enabled to support a wife and the family that may come to him. I do not mean that he shall have wealth, but a calling, a business, a place in which he can earn what is needed for the wants of a family.

The great trouble in my judgment is that the state does not look carefully enough as to the qualification of parties it permits to marry. When it permits the marriage of boys and girls who ought to be in the schools, a portion of the time at least, who have limited knowledge of the relations assumed, who are not in any sense competent to assume these relations, who have but little care and thought of the responsibilities of life, who if restrained to a proper age in nine cases in ten would not marry the one they have fondness for in their teens, who are permitted to assume relations without maturity—mentally or physically, is it any wonder there are so many people seeking to be relieved of conditions which are not only irksome but positively wonderful.

The law forbidding the marriage of relatives by consanginity within certain degrees exists for the benefit of posterity.

It is upon the theory that the children of such a marriage are

apt to be weak mentally or physically.

The state wants strong men and women. It is in its best interest that this should be so.

If the right exists to prohibit such a marriage under the law, why not prohibit the marriage of people who have within themselves the weakness of disease to the extent that it is certain to be transmitted to the off-spring of the marriage.

Why not prohibit the marriage of inebriates, where there is the least danger of transmitting to the children of such a marriage the taint of the liquor curse.

We are to-day supporting institutions that exist in the main for the care of the unfortunates, brought into the world by the violation of the laws of nature, but permitted, because not restrained by the laws of this state, and every day these evils are becoming greater, and more burdensome.

If the laws of the state on this important matter was in consonance with the ordinary sense, used by the generality of men in business matters, there could be and would be within a single generation an improvement in my judgment that would be marked.

The evils of divorce are harmful enough and distasteful enough, but they can not be compared to the evils arising from hasty, inconsiderate, and ill-advised marriages.

The tendency of the law-making power has been in the right direction of late, but in my judgment it should go very much farther and should give more attention to marriages than divorces.

Lawyers are censured many times for engaging in the divorce business, and there are some who will have nothing to do with it, others who only take the more meritorious cases.

However they may be censured, it is my judgment, they are not as censurable as the ones who, in so many cases, without care or thought of results, perform the marriage ceremony.

It is seldom a refusal to marry is ever met by our brethren of the ministry, whatever the situation may be, provided the parties have the license. I do not now censure them for it, but I respectfully suggest that a little more discretion and wisdom on their part might remove much of the cause of censure they assign to our profession.

The practice of some ministers of opening marriage offices and holding out to the world that they are in the business, and of seeing to it that the number of marriage ceremonies in a day, or a week, or a month, or a year is duly heralded in the papers, is no better

than that of a quack who advertises his business by the same methods, and to them many couples who could not be married where they are known, go for relief, and for a fee it is done.

It is my judgment we need a national marriage law, the same in all the states, that will put an end to this reprehensible business. More restriction should be placed upon the right to marry, restrictions that would put marriage upon the foundation of common sense. Upon the basis of common honesty, as between the parties and the public, that would throw such a shield around it that some publicity would be given of the contemplated marriage, and that infants could not marry under any circumstances.

If this is done, it will in a large measure do away with the evils of divorce, which in my judgment, is not so much of an evil as the cause of it is so many times, the hasty and ill considered marriage.

While it can not be disputed that the state is liberal in its causes for divorce, more liberal by far than I would be, had I the writing of its divorce laws. Yet it is far to liberal in its marriage laws, and there is where I would commence the reform of the evils of divorce.

To recapitulate: It is my judgment that the law of the state is far to lax and lenient in the punishment of offences committed between the sexes, leading the general public to regard its violation as of small importance.

That it should so frame its marriage laws that people would be at least of the age known in the law as competent to make an ordinary binding contract of purchase and sale, and that the man should have some calling or business which ordinarily would furnish him with the means with which to meet the responsibilities that come to a home, and that marriages where the off-spring are liable to be weak mentally and physically, should be prohibited.

These are not unreasonable requirements. On the other hand they are not only requirements in the interest of the parties, but of more than ordinary interest to the state, and a matter in which it, in my judgment, has a right to intervene and by wise and wholesome laws so regulate this important relation that it may in some measure relieve itself from the results of its present policy, and from my observation I haven't a doubt that in a few years the beneficient effects of such a course would be plainly apparent.

# THE NEW COMPILATION AND DIGEST PROVIDED FOR IN ACT 268 OF PUBLIC ACTS OF 1895.

JUDGE R. R. PEALER.

Act No. 268 of the Public Acts of 1895, provides that the general laws of this state shall be compiled without alteration, under appropriate heads and titles, with marginal notes and references, and an index thereto with a complete digest of the decisions of the supreme court of this state relating to such general laws, pursuant to the provisions of section fifteen of article eighteen of the constitution of this state.

When the bill which was developed into this act was first introduced in the legislature, it simply provided for a compilation, and owing to this fact as well as to the great value the members of the bar placed upon Howell's Annotated Statutes, and possibly also somewhat owing to the activity of the publishers of that work, considerable opposition was developed against the bill, and perhaps it may safely be said that there was a want of confidence generally in the outcome. No one knows just what the scope of the work provided for would be, and most feared that it might be limited to a compilation. Again, no one could tell who was to be elected compiler, and many feared that a job might be provided for some incompetent man.

The bill was finally amended so as to provide for marginal notes and a digest, and then passed both houses and became a law.

Louis M. Miller, then clerk of the House of Representatives, was chosen as compiler of the legislature and soon entered upon the discharge of his duties. After some months had passed and the work of compiling was well under way, Judge Stanfield of Mt. Clemens and (the writer) R. R. Pealer of Three Rivers were appointed the commissioners by Governor Rich.

So far these commissioners have no doubt had the best opportunity to learn of the character of Mr. Miller's work, and without detracting in the least or in any way from the credit due those be-

fore him, I take this opportunity of assuring the members of this association present and the gentlemen of the bench and bar of the state of the merits of Mr. Miller's work, and ask for him your entire confidence and your earnest support in securing any early publication of the statutes as now compiled. We know that the compilation has been carefully made, each section of the general laws as embraced in Howell's statutes and in the public acts has been checked and found embraced in this new work, some acts and parts of acts previously omitted or out of place have been brought under proper heads, and wherever there has been a question as to the language of a section, it has been compared with the original in the office of the secretary of state and corrected if need be. We believe the arrangement under the different titles will be convenient and satisfactory, and that all the laws relating to any certain subject will be found under the proper title. Full notes will be found touching the several sections through which all can readily trace the growth and changes in the law—the digesting, so far appears to have been carefully done, and in short, we believe that all can rely on having a work when published, worthy of this great state.

Mr. Miller is a lawyer by profession and has been either clerk of the House or secretary of the Senate of this state for about twenty years, and his experience in this line with a very retentative memory has given him perhaps as great familiarity with the general statutes as that of any man now living in the state. He had also had considerable experience in arranging matter for the printer and in proof reading and in editorial work generally, and this qualified him to readily detect typographical errors. Besides these, he has prepared the index for the public acts for a number of sessions, and his experience and skill along this line renders it certain that we shall have that very desirable part of such a lone book, a general index.

Taking all things in consideration, we think the compiler is well equipped and has special fitness for the work and that he has been diligent, and his work will be thorough and reliable in all points. The importance of presenting these facts now rests mainly in this. The next legislature will have to provide for printing this work before it can be published. It may be well to embrace the acts of the coming session but there should be no obstacle placed in the way of its early publication. Let there be an urgent demand for it by the bench and bar. It will be economy for the state to publish and own its own statutes, and besides it will be more in keeping with the dig-

nity of the state. The state should protect itself and its citizens against the greed of the owners of a copyrighted work should any appear. It should reserve all the labor and profit of publishing as far as practicable for its own people. If the state owns the work it can revise and reprint whenever it may wish. It need not wait for a satisfactory contract with outside parties or obligate itself to take what it may not need.

Again, it seems clear that the laws can be furnished the officers of the state at a much less expense than now and can be sold to our citizens at a less price if published by the state. At the rate of the present state printing contract it is claimed that the two volumes can be furnished for $2.25 per volume and probably for a less sum. The general laws have been extensively amended, revised, repealed, superseded and added to since the publication of the annotated statutes, the work of re-compiling has been finished, and the digest nearly so, and now there should be no halting about publishing it. We should have it published at the first opportunity so that all may more readily ascertain what the statute laws of this state are. This is important to the individual, the township, county, city and state officers, as well as to the bar and bench.

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## *NOTES.*

With this number, as has been our custom for the past two years, we present to our readers articles and subjects read and discussed at the annual meeting of the Association of Judges of Michigan, held in the latter part of December in Detroit. Whatever interests the judges should interest the lawyers, especially since the influence of the latter is largely dependent on their knowledge of the ideas, prejudices and inclinations of the former.

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A new year has begun and the people of the United States and also the people of the United Kingdom are to be congratulated upon the signing of the treaty of arbitration between their respective governments. This is the way to start the new year "at peace with God and the world," and with more ample assurances than ever before the continuance of such a happy condition of affairs. On January 11th, 1897, the treaty was signed by Secretary of State Olney, acting for this government, and by Sir Julian Pauncefote, the British ambassador, on behalf of England.

To the bar of this country and especially to the bar and bar associations of the state of New York, should be given much if not most of the credit for this happy consummation of a brilliant idea. It was the action of the New York bar association which started the idea of a treaty such as we see in operation to-day. The brains of lawyers conceived it; their endeavors advanced and promulgated it; their determination and push completed it.

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At the annual session of Judges of Michigan, which was recently held in Detroit, there were several topics announced for discussion

which would have been of general interest to the members of the state bar; and among the subjects discussed, perhaps not the least important, was one relative to "the responsibility of a judge for the proper administration of justice during the progress of the trial." This topic was discussed more particularly with reference to the right of a judge to interfere, during the progress of a trial, by way of making suggestions to counsel, examining witnesses, etc., in order that the ends of justice might be reached, and it might be said that those who entered upon the discussion, seemed uniformly favorable to the idea that a judge not only has the right, but that it is his duty to interfere in behalf of the respection rights of the litigants. One of the judges went so far as to state that it had been his practice while on the bench, whenever he perceived that a litigant's rights were being ignored for want of proper management on the part of his attorney, "to suggest to such attorney what would be essential to be shown by the testimony of his witnesses, in order to establish or protect those rights." Judicial suggestions of this nature, coming as they do by way of counsel, should only be given in extreme cases. Another of the judges said, in effect, that he had pursued the same course, and that he had often been called upon, especially in criminal cases, where the state was represented by young and experienced prosecutors, to "lend a helping hand that the ends of justice might not be defeated"; or in other words, where the people or an individual come into court with "a fool for an attorney," this misfortune ought not to bar either party of their respective rights. But while we would certainly agree with the learned judge that, ordinarily, "a fool for a lawyer" places the client at a decided disadvantage, yet, were we to go further, and recognize the right of the judge to interfere under such circumstances as we have suggested, it would seem in our humble opinion and without any intended offense, that the misfortune might readily become a rich blessing; and instead of having his cause lost by an incompetent lawyer, the litigant could always count at least upon this "judicial protectorate" to guard his interests.

If therefore, judges are willing to act also in the capacity of counsel, what need of retaining able counsel to represent and protect your interests, why not better go into court unattended, or at best, with some cheap-rate counsel as your attorney, if you might then be able to rely upon all the learning of the judge to aid and assist you?

But we are unwilling to concede to the judge, this right of interferance; for, not only is it unwarranted and wholly in excess of the authority conferred upon him as a judge, but it is a practice which, being too easily abused, is more harmful than advantageous. An official, with such an arbitrary power, thereby becomes a dictator, a partisan; and that beautiful symbol of justice, a woman, blindfolded (we suppose in order that she may not look over her spectacles, and judiciously smile upon her friends), who stands holding the scales by which she impartially weighs testimony, as it is presented to her,

not as it really ought to be, would be quite inappropriate; and would better give place to a symbol of more modern conception, a grocer's clerk, per chance, with the pound weight in one pan of the scales and a sufficiently well-filled scoop of sugar in hand to make the scales balance or over-balance as he may desire. And when we consider "that the best of men are only men at best," and that our judges are selected from the bar, because of their ability as trial lawyers, with all due respect, they are only too ready to assume the rights of one or the other party as such; and great caution should be exercised on the part of a judicial officer, to treat the parties with equal consideration; for when the judge permits himself to act in any manner as counsel for either party, he at once becomes the trial lawyer again, and enters the contest as such.

It would seem that the judges of our courts already have quite enough discretionary power, which is delegated to them, without assuming unto themselves that which the constitution neither grants nor concedes to them.

## LEGAL MISCELLANY.

Presidential electors, although they are not named in the state constitution, are held to be state officers, in *Todd* v. *Johnson* (*Ky.*) *33 L. R. A. 399*, within the meaning of a constitutional provision providing for filling vacancies in office which occur before an annual election at which state officers are to be elected.

An ordinance against animals running at large in the streets is held, in *Elliott* v. *Kitchens* (*Ala.*) *33 L. R. A. 364*, to be inapplicable to a colt three months old following its dam when she is driven along the street with the colt directly in front of or by her side until separated from her and chased away by a horse running at large.

A statute prohibiting any other business except the sale of cigars and tobacco to be carried on in a room in which intoxicating liquors are sold under a license and prohibiting any device for amusement or music therein and also requiring such rooms to be closed and locked during prohibited hours and days, is sustained in *State* v. *Gerhardt* (*Ind.*) *33 L. R. A. 313*, on the ground that such provisions and all similar conditions imposed by the legislature in the exercise of its police power must be deemed to be consented to by a person who accepts a license.

An attorney who holds a claim for collection is held, in *Havemeyer* v. *Dahn* (*Neb.*) *33 L. R. A. 332*, not to be disqualified from taking an acknowledgment as notary public of a mortgage made to secure the claim. The somewhat similar case of *Cooper* v. *Hamilton Perpet. B. & L. Asso.* (*Tenn.*) *33 L. R. A. 338*, holds that a stockholder and director of a corporation is not disqualified to take an acknowledgement of a deed of trust to the corporation. With these cases is a note in which the authorities are found on the general question of the right of interested persons to take an acknowledgement.

An attempt by an attorney to withdraw his answer and appearance in a divorce case, when made in avowed hostility to his client and as an act of retaliation for alleged non-payment of his fees, was held, in *Nickells* v. *Nickells* (*N. D.*) *33 L. R. A. 515*, to be outside the scope of his authority, and a judgment by default taken after such withdrawal was set aside. The annotation to this case reviews the decisions on the power of a defendant's attorney to withdraw an answer or appearance and permit a default judgment.

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The New York Court of Appeals decided in December, 1896, the case of *Mary Talbot, appellant*, v. *Stephen VanRensselaer Cruger, et. al., respondents*, the following interesting point: The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy, and, being in the nature of a privelege, it must be exercised before the expiration of the term, or before he quits possession. If the right to remove other fixtures exists by virtue of some agreement, then it must be exercised in like manner. By entering upon a new lease, in which the tenant's right to remove such fixtures is not reserved, although it existed under the former tenacy, the right is determined, and this is true, even where there is a continuous holding. Unless the reservation is made in the new lease, the right will be deemed to have been abandoned, and the fixtures will become the property of the landlord. — *New York Law Journal.*

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They were discussing the administration of justice in this and other countries when the Major told this story to illustrate a claim made in the course of his argument:

When out on the frontier trying to disprove the adage that a rolling stone gathers no moss, I became pretty well acquainted with a rugged old pioneer who came dangerously near to being an absolute monarch in his community. All the legalized authority he exerted was that of a justice of the peace, but it was astounding how far he could make it go. The whole judicial system does not contemplate a greater power than he exerted through his little office.

On one occasion a drunken rustler only shot and killed a hog that happened to be the magistrate's property. He sat right down and drew an affidavit for the arrest of the offender. Then he stood up and swore himself in as a special constable, pinned a cheap star on his breast, took his winchester, mounted his horse and went after the hog-killer. The special constable of his own making got the drop on his man and returned with him as his prisoner.

Then you should have heard the trial. The magistrate first read the charge to the accused, who entered a plea of 'not guilty.' Then the court stepped to the front of his own bench, which was a rough redwood table, and conducted the prosecution, asking himself ques-

tions and answering them, allowing the prisoner to enter an objection or take exception whenever he desired.

The case for the people being made, the magistrate said the fellow must have a fair trial, and appeared as lawyer for the defense. So long as he was acting his role and the rustler was doing the swearing, it looked as though he might be acquitted. But again his honor became the prosecutor for the purpose of cross-examination, and the way he showed the desperado up looked as though it might be a life sentence. After arguing both sides, with a rousing close for the prosecution, the magistrate quoted such law as he knew, gave the prisoner at the bar a scathing dressing down, fined him $10, and sentenced him to six months in jail, which he was without the slightest right of doing. — *Detroit Free Press.*

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In view of these election figures much interest will attach to the result of the census enumeration which must be made a little more than three years hence. The preparations for that enumeration are under discussion. It is quite time that the plans for so colossal an undertaking should be well in hand. The best opinion upon this subject, both in Europe and America, unanimously favors the maintenance of a permanent census bureau, as distinguished from an organization temporarily created once in ten years. It is true that the actual enumeration must require the employment of a great army of temporary agents; but the director of the census should be a permanent official, and he should have in his office at Washington a staff of expert assistants and statisticians always at work. Most of the special inquiries which are undertaken every ten years in connection with the census, could well be distributed throughout the intervening years, so that there would be no lack of tasks of an important character to keep the bureau occupied. Hon. Carroll D. Wright, Superintendent of the Department of Labor, was authorized some time ago by Congress to draft a bill outlining the organization and work of a permanent census bureau. Colonel Wright has complied with this instruction, and his draft is now in the hands of the proper Congressional committee. The American Statistical Association and the American Economic Association, at their last annual meetings appointed representatives to confer as a joint committee upon this question of a permanent census bureau. This joint committee was made up of statistical experts and other gentlemen having a wide general knowledge of the subject in question. A unanimous agreement has been reached by the joint committee in favor of a permanent census bureau; and Congress has been memorialized to that effect. The statistical work of the Department of Agriculture might well be made over to such a permanent census bureau, and other statistical undertakings could from time to time be devolved upon the bureau as circumstances might seem to render advisable. — From "The Progress of the World," in January *Review of Reviews.*

The case of *Holden* v. *Hardy*, *46 Pac. Rep. 756*, recently decided by the supreme court of Utah has attracted wide attention because of the universal interest of the subject involved. The constitution of Utah contains an article expressly regulating the relations between employers and laborers which reads as follows: "Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal governments; and the legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines." The holding of the court was that a statute of that state providing that the "period of employment of workingmen in all underground mines shall be eight hours per day, except in case of emergency, where life or property is in imminent danger," and constituting it a misdemeanor to employ a person for a longer period per day in such work, is constitutional. The court besides relying upon the constitutional provision above quoted, discussed the question before it on general principles of constitutional law, and held that the statute was not objectionable under any provision of the federal constitution. The decision of the supreme court of the United States in *Soon Hing* v. *Crowley*, *113 U. S. 703*, is closely in point. In that case, it appeared that "an ordinance of the city and county of San Francisco prohibited the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county from 10 o'clock at night until 6 o'clock on the morning of the following day; and one Soon Hing was fined and imprisoned for violation of it, and he petitioned for a writ of *habeas corpus* on the ground that the ordinance was void, because it discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property, and that the board had no power to pass it. The writ was denied by the lower court, and the judgment was brought before the supreme court of the United States, and affirmed by that court. Among other things that court said in its opinion: "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws. *Soon Hing* v. *Crowley*, *113 U. S. 703*, *5 Sup. Ct. Rep. 730*; *Barbier* v. *Connolly*, *113 U. S. 27*, *5 Sup. Ct. Rep. 357*. — *Central Law Journal.*

# BOOK REVIEWS.

A TREATISE ON MECHANIC'S LIENS.—By LOUIS BOISO, JR., A. B., L. L. B. of the Chicago Bar. Published by West Publishing Company, St. Paul, Minn.

A lien is the right one person has to detain the property of another, which he has in his possession, till he obtains certain rights from the owner. The common law liens were particular or general, the former being the right to retain a specific piece of property to satisfy a claim against it; the latter a right to retain property generally on account of obligations which exist against the owner of the property. Although the common law liens covered a great variety of obligations, yet the various statutes of the different states have increased the scope of liens, and opened a wider field for investigation and litigation, and the author who has covered this field and has made plain, the laws of liens as they now are, in all their modern application, must have expended a great deal of hard work.

The only mechanic's lien at common law was the right to retain specific property in the mechanic's hands, for a claim for repairs, improvement or other labor or materials put upon or added to it. This lien was released when the property passed out of the mechanic's hands. The author confuses the lawyer, familiar with the common law lien, by applying a mechanic's lien to a lien created by modern statutes. In some of the states the liens on real estate created by statutes are not confined to mechanics, but is extended to materials furnished and other things, so that it would have been better to follow the trend of the statutes, and not use the "mechanic's lien" to apply to real property only. The author finds great difficulty in discussing real estate liens, because the various statutes are so very different in their provision, and he is obliged to take a large amount of space in his book in reviewing the statutes of the different states.

However, the author has extensively and ably treated those subjects which are common to all statutory liens and the construction and validity of them, and he has sustained his views expressed in the text of his treaties by numerous and well selected cases, from the creation of statutory liens down to the present time. The book is a valuable labor-saving one, for any lawyer who is engaged in the enforcement of liens, and the value of the book can be easily saved in preparing one lien suit for trial.

## RECENT MICHIGAN DECISIONS.

CORPORATION LAW — DIRECTORS — RIGHT OF DIRECTORS TO OBTAIN PERSONAL SECURITY — PURCHASE OF SECURITY BY DIRECTOR. — The directors of an insolvent corporation can legally authorize the securing of bona fide debts of the corporation on which they are contingently liable, either as guarantors, endorsers or otherwise.

A director, who has aided the corporation with his credit, at the request of all the stockholders, and has done all in his power to make the business a success, has a right to obtain indemnity in case of the company's insolvency.

A director may loan money to the corporation, and thereby become its creditor, and may take security for the debt even though the company is insolvent, and may have the benefit of such security by bidding for the property at the foreclosure sale thereof. *Lucas* v. *Friant, et. al.* (January 5, 1897.)

FIXTURE—LIEN OF VENDOR—INTENTION OF PARTIES AS DETERMINING CHARACTER OF THING AFFIXED. — A vendor may retain title to personal property sold until paid for, and the vendee cannot, before his title become absolute, pass a good title to the property; the good faith of a purchaser from the vendee is immaterial; nor is the question of the vendor's rights material.

The controlling principle in determining the question of fixtures is the question of the parties.

The fact that there was never unity of title of the realty and personality in one and the same person or persons, and that, during the various dealings, all the parties interested treated the thing affixed as personal property and not as a fixture. Held to be conclusive in determining its characteristic. *Lansing Iron and Engine Works* v. *Wilbur.* (January 5, 1897.)

WAREHOUSEMAN—LIEN FOR STORAGE—RIGHT OF OWNER OF BUILDING TO ASSERT LIEN UPON GOODS LEFT IN HIS STORE. — Lien asserted by complainant upon certain goods in a store building owned by him and the property of a former tenant. The goods were left in the store during litigation as to their ownership and the lease surrendered to complainant. It was shown that the complainant notified both of the litigants that he should assert a lien and that he was the only person having possession, and it was held that a decree awarding him $50 a month for storage was not erroneous.

A lien asserted by a deputy sheriff by reason of a levy on the goods while in complainant's possession could not be maintained, it appearing that the execution ran against the husband while the wife was the owner of the property. *Schneider* v. *Stone.* (January 5, 1897.)

BOUNDARY LINES—ADJUSTMENT—MISTAKE. — A parol agreement in settlement of disputed boundaries will not be enforced unless the adjustment is accompanied or followed by the existence or erection of distinctive land marks showing the bounds of the respective parcels, and exclusive occupancy in accordance therewith.

Where parties have reduced their agreement to writing the terms of the written instrument must control, as against contemporaneous parol agreements. *De Long* v. *Baldwin, et. al.* (January 5, 1897.)

MUNICIPAL LAW—IMPROVEMENT TO PUBLIC STREET—RE-PAVEMENT.—Washington avenue, in the city of Detroit, was paved with stone. The pavement was in the center of the street and 40 feet wide. The city caused this pavement to be taken up, and the street paved in two roadways, each 25 feet wide, a center space 100 feet in width being reserved for park purposes. This improvement was assessed as a paving improvement, and it was held, that the improvement was a re-pavement and could not be lawfully assessed upon premiees adjoining. *Dickinson* v. *City of Detroit.* (Jan. 5, 1897.)

# CURRENT LITERATURE.

*Appleton's Popular Science Monthly* for January keeps up its standard of merit and is a very interesting number. "Principles of Taxation" by Hon. David A. Wells is an especially interesting article to lawyers. Mr. Wells' remarks on taxation deserve especial attention since he has given to this subject the critical study of years. "An Object Lesson in Social Reform," by Franklin Smith, "Our Present Knowledge of the Antartic Regions," a translation from *Revue des Deux Mondes* entitled the "Evolution of the Carrier Pigeon," treating somewhat of the idea of location possessed by doves and certain wild animals and much argued for and against at this time as well as several other articles gives instructive reading for quite a number of leisure hours.

*Appletons' Popular Science Monthly* for February is announced to open with an account of Herbert Spencer: "The Man and his Work," by Prof. William Henry Hudson, who was at one time intimately associated with the philosopher of evolution in his literary labors. The account explains the leading principles of Spencer's Synthetic Philosophy, of which the tenth and concluding volume has recently been issued, and tells under what conditions this great work has been brought to completion. A discussion of "Tendencies in Athletics for Women" by Sophia Richardson will also appear. The writer points out the superiority which earnestly played games have in some respects over gymnasium exercises, and shows how American college girls waste time in forcing a dulled brain through tasks that could be mastered easily and quickly with the aid of invigorating exercise.

There is no one among the younger novelists of whom more is expected than Mr. Paul Leicester Ford. Two years or more ago he published his first novel "The Honorable Peter Stirling," which has had the unusual and almost unprecedented experience of meeting a continous and successful sale ever since. It is unusual, too, in this respect, — that it is almost the first American political novel that has been a decided success. Mr. Ford is a most interesting personality. He grew up in the large and well equipped library of his father in Brooklyn, N. Y., which is one of the best private historical libraries in the United States, and he has made a special study of American history, in which he is an acknowledged authority. Most of his work, indeed, has been until lately purely historical. He has edited the writings of Jefferson and made substantial contributions to historical research, especially of the revolutionary era. Now Mr. Ford has shown most unusual versatility by writing a novel that is not historical, but that is a love story pure and simple, and which, judging by its opening chapters, is as delicate and pure in its tone as the best romances in our language. Incidentally it illustrates student life in Europe and contains perhaps the most interesting and truthful picture of the methods of modern journalism and of the production of literary wares in New York that has ever been written. This charming "Story of an Untold Love" starts in the January *Atlantic Monthly* and will run through about six numbers of the magazine. Although Mr. Ford already has to his credit so considerable a volume of historical and imaginative work, he is yet a young man, and is at the beginning of a most promising career as a well-equipped, versatile man of letters. Other articles of the month are "A Century of Social Betterment" by John B. McMaster, "Dominant Forces in Southern Life" and "Emerson Sixty Years After."

*Public Opinion* in a late number gives condensations of several of the important articles of this month's magazines. "A Century of Social Betterment," which appeared in the January number of the *Atlantic Monthly* is substantially set out and several other articles all well selected are in like manner printed in a condensed form. To those who cannot afford many magazines and who desire to keep abreast with the knowledge and literature of the times this is a good advice: Take *Public Opinion.*

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The January number of the *North American Review* contains a most carefully written paper by Senator Henry Cabot Lodge entitled "The Meaning of the Votes." It is a terse deprecation of the system of computations, indulged in by many, who aim to show that if a certain number of votes had been changed in one state and a certain number in another, the result of the presidential election would have been entirely different. Senator Lodge deftly demonstrates in some plain and simply compiled tabulations of his own that Governor McKinley received the largest plurality and largest majority over all ever given to a President, except in 1872, when Grant defeated Greeley. The subject of "The German Press and the United States," is presented with keen insight into the several causes which make us at present the target for Prussian press malevolence.

"Strikes are the insurrections of labor, Strikes mean progress," writes M. E. J. Kelley in the same number, discussing from the workman's standpoint the subject of "Strikes as a Factor in Progress." The trades-Unionist side of the question is eloquently presented, and the declaration made that all strikes, whether successful or not, are beneficial to the working people in the long run, for the reason that great labor movements awaken and interest people who otherwise would never think of labor conditions, or their relation to civilization generally. Andrew Lang contributes a delightful essay on "Genius in Children." The eccentricities which distinguished the boyhood of many famous men in letters and art are piquantly desribed by Mr. Lang, whose opinion is, that as a genius "varies from the kindly race of men," it is a mistake, even in childhood, for parents to attempt to drive them too hard into uncongenial pursuits and industries. Several other articles complete and fill out a very interesting number.

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# THE CHARGE OF MR. JUSTICE STEPHEN IN THE MAYBRICK CASE REVIEWED AND CRITICISED.

CLARK BELL, ESQ., L. L. D., OF THE NEW YORK BAR.

Under the law of England, errors of law in the charge of a trial judge are substantially remediless so far as a review on appeal is concerned.

The report of the Woman's Committee of the Psychological Section, which asserted such a violation in the charge of Sir James Stephen in the Maybrick case, did not enumerate the particular points to which their general indictment related.

The discussion of that report before the Medico-Legal Society, was general and did not particularize, and it is perhaps proper, to specify some of the more glaring examples of what may be properly claimed to be fair subjects of criticism in that charge; as they might have been urged, as reasons for a new trial, were the case one before an American court of review, or if such an application was made in a civil case on appeal or a motion for a new trial in an appellate court in England.

Without going into an elaborate review of the entire charge, let us examine a few of the most glaring instances that have appeared on an examination of portions of that charge — and I give

*Extracts from Charge with Comments by way of Objection.*

CHARGE 1. "It seems to me, though it is very difficult to put the matter fairly, that the real crucial question seems to be, how did the poison found in that man's liver and other organs get there? Did it get there in such a degree and in such a way as to show that the cause of death was arsenical poisoning, or did it get there in a way that could otherwise be accounted for? When you have gone through the whole of the case and when I have called your attention to every part of it, you will find that this is the main question for your decision. The answer to that question will really and substantially settle the case whether you think one way or the other. If you can show a sufficient quantity to cause death, why you need not go further. It seems to me too plain for argument if you can show that you really get a deadly dose of poison in that man. I am so much brought to that opinion that I am disposed to miss a good deal out of the evidence, because it comes to that, look at it how you please. * * Who put it there? Well so far as one could see, it could not come there of itself. So who put it there? Now there are several ways of answering this question which do not involve guilt on the part of any one. You must consider the degree of probability which may be attached to each of these different ways. The first which was suggested is that Mr. Maybrick put it there himself — namely, that he, owing to grounds which must be carefully considered, had been in the habit of eating arsenic. Gentlemen, the first way which is suggested, is that Mr. Maybrick put, on grounds known only to himself, arsenic into his food, owing to this dreadful habit he had acquired of taking arsenic. Another way, and the only way in which the arsenic could not have been administered criminally was the improper taking of it as medicine. The only other way which is suggested that I know of in which the arsenic could have been put into him is by crime. It might have been put in by himself through an unwise and injudicious act of self-indulgence, or it may have been put in by somebody else by crime. When you come to consider the matter carefully you will find that in one way or the other of these two ways the matter must have got into his body. * * The arsenic may have been taken by unwise and injudicious habits of self-indulgence—that is one thing. It may have been by the taking of medicines improperly or by some means of the kind. If it was taken in this way the presence of arsenic may be reasonably accounted for. If, however, you think there is a possibility of doubt you ought to acquit the prisoner. If, however, it did not come into his body in

either of these ways I can hardly see how it has been administered except by crime and it has not been suggested that any one could well be the criminal except the prisoner in the dock."

OBJECTION 1. It being plainly possible that the arsenic might have been administered by crime and yet not have caused death (as the Home Secretary with the assent of the Judge afterwards admitted) the Judge ought to have told the jury that even if they were satisfied that the arsenic in the body had been introduced by crime they must further be satisfied beyond all reasonable doubt that it had caused the death before convicting the prisoner of murder, which was the only charge against her.

2. He should also have told them that it was not for the prisoner to show that some other person had criminally administered arsenic to the deceased, and that the evidence against her being of a purely circumstantial character they should carefully consider whether on the assumption of a criminal administration of arsenic, it had been established beyond all reasonable doubt that she was the criminal.

[It will probably be alleged that the prisoner has got the benefit of the first of these objections through the Home Secretary's decision of sparing her life. But a doubt as to whether the criminal administration of arsenic caused death would have entitled her to an acquittal on the charge of murder, and if afterwards tried for a criminal administration of arsenic she would have had 1. The chance of an acquittal. 2. The chance of the jury finding that it was given not with intent to murder, but with intent to injure, aggrieve or annoy, in which case the maximum sentence would have already expired. 3. The chance (amounting to a strong probability) that if convicted of attempt to murder the presiding judge would not have passed the maximum sentence of penal servitude for life.]

CHARGE 2. "You must decide whether of the two (Dr. Stevenson and Dr. Tidy) is correct."

OBJECTION. He should have told the jury that if they were in doubt which was correct they should acquit the prisoner, and that there was no necessity for their arriving at a positive conclusion on the subject.

CHARGE 3. "But from the 28th of April — from the beginning of his illness — we know everything that was administered. Everything was under the most careful and watchful regimen of medical men and nurses and he could hardly have taken anything to cause these painful symptoms."

OBJECTION. He could have dosed himself with anything he pleased up to the 4th of May, the first day that he spent in bed, and it was proved that on the 3rd day of May (the day on which he got a decided change for the worse) he forgot to take with him to his office the lunch which his wife had prepared for him in accordance with Dr. Humphreys' directions, and we therefore know that if he took any lunch on that day it was *not* what had been prescribed by the doctor.

CHARGE 4. A see also B. "You must not consider the case as a mere medical case in which you are to decide whether the man did or did not die of arsenic according to the medical evidence. You are not to consider it as a mere chemical case in which you are to decide whether the man died from arsenic which was discovered as the result of a chemical analysis. You must decide it as a great and highly important case involving in itself a most highly important moral question; and by that term moral question I do not mean questions of what is right or wrong in a moral point of view, but questions into which human nature enters and on which you must rely on your knowledge of human nature in determining the resolution you arrive at.

OBJECTION. He should have told the jury that in determining whether the man died of arsenic or not they were to be guided by the medical and chemical evidence only, and that unless it was proved beyond reasonable doubt that the man died of arsenic, the prisoner's motives and her moral character were wholly irrelevant to the issue.

CHARGE 5. The judge told the jury the result of certain experiments made on a dog and proved on another trial for poisoning and proceeded; "that is the kind of thing to be taken into consideration when you come to consider the small quantity" of arsenic found in the body, &c.

OBJECTION. The evidence in question was not given in this case but on the trial of Dr. Smethurst 30 years before, and ought not to have been introduced. Its import was moreover misstated by the judge and if correctly stated would have rather favored the prisoner.

CHARGE 6. Immediately after mentioning the purchase of fly-papers by Mrs. Maybrick, "it has been shown that arsenic was found in this medicine and you have Mr. Maybrick saying he was very sick and in great pain after taking it."

OBJECTION. There was no proof that he had taken the medicine

in which arsenic was detected on this morning, and there was proof (in the evidence of May Cadwallader to which the judge did not refer) that he ascribed this illness to a different medicine on that occasion, of which latter medicine he said he had taken an overdose. In another passage of the charge he ascribed this statement to the witness Alice Yapp, but erroneously,

CHARGE 7. "It was pointed out then that what kills in regard to arsenic was the part which was in process of going through the body not that which remained in the body."

OBJECTION. This is not the medical evidence.

CHARGE B. See also A before. See 4. "There are three or four circumstances in this case which are circumstances of very grave suspicion and where you find a case in which this dreadful accusation is made and is accompanied with circumstances which apart from the physical, chemical and medical aspects of the case are of such a character as are likely to produce suspicion you must consider how far they corroborate the other evidence that has been given," (and he goes on to make a very unfair comparison.)

OBJECTION See A. These suspicious circumstances are only of use as a clue to the criminal after death by poisoning has been proved, and unless they are so conclusive as to exclude poisoning by any one else, they do not diminish but increase the doubt of the prisoner's guilt arising on the medical and chemical evidence. The judge throughout failed to point out the two distinct issues: 1. Did the man die of arsenic? 2. *If so*, was it feloniously administered by the prisoner?

CHARGE 8. See 2. "We have to consider this not in an unfeeling spirit—far from it—but in the spirit of people resolving to solve by intellectual means an intellectual problem of great difficulty. * * The question for you is by what was the illness caused — by arsenic or some other means."

OBJECTION. He should have told them that it was not necessary for them to solve the intellectual problem or to find positively the cause of death, but to consider whether there was a reasonable doubt on either subject, and if so to acquit the prisoner; and that the very difficulty of solving the intellectual problem implied that the case was not free from doubt.

CHARGE 9. "These two letters certainly do show in the most unmistakable terms what was the position of this woman as regards wicked falsehoods." (The judge was discrediting the statement which she made in court.)

OBJECTION. Finding letters in the possession of the prisoner in which the writer accused her of falsehood, is no evidence of actual falsehood, and no evidence was given to show that she had actually deceived them. Moreover the expression "a staggerer" in the letter to Brierley which the judge relied on as a charge of falsehood, evidently meant a startling or alarming statement, not a false one.

CHARGE 10. (As to Mrs. Maybrick's letter to Brierley), "It is all a question how long his strength will hold out and that he will soon die."

OBJECTION. These are not the words of the letter, nor, it is submitted, is it a fair and reasonable construction of it.

In several passages the effect of adultery in destroying all moral principles seems to be much exaggerated.

There are many minor mistakes on matters of fact and many incidents are involved in inextricable confusion by the judge's mode of dealing with them. He is not even consistent. For example, take the following two statements which were both used against the prisoner in different connections and in different parts of the charge.

"I asked a question to ascertain the relations between Dr. Hopper and these Maybricks. He said he was just the family doctor," * * * * "Do you think a quarrel of that sort can be made up by the family doctor who is not very intimate with them—that his saying 'Oh, you had better make it up and be friends' would settle it?"

"It is one of the singularities of the case if you consider the past relations between Dr. Hopper and the Maybricks. They seem to have consulted him and to have been most intimate friends on terms of the strictest confidence." (This refers to a refusal of Mrs. Maybrick to call him to consult with Dr. Humphreys when suggested by Alice Yapp.)

*Here are two Minor Errors or Faults.*

CHARGE 11. "He had a small taste out of it (the meat-juice) before it was poisoned."

OBJECTION. He should not have assumed that Mrs. Maybrick introduced the poison into the meat-juice (as he did also in other passages of the charge) but have laid the evidence on the subject in detail before the jury and left them to decide whether the proof that she had put it in was conclusive—which it is submitted it was not.

CHARGE 12. "Two grains of it (arsenic) given in five successive days would have killed him." (The judge is stating Dr. Carter's evidence.)

OBJECTION. Dr. Carter gave this as the smallest fatal dose on record and did not say that it would have killed Mr. Maybrick.

OBJECTION 13. A Dr. Thomas Stevenson had been questioned upon the subject of the very small amount of arsenic found in the remains, based on a comparison of the part analyzed by him, and his answers upon so very important a part of the scientific evidence were careful, fair and guarded substantially, "that it was possible that a possibly approximate deadly dose existed in the whole body."

It was not denied and was indeed conceded that some arsenic would be eliminated during life, but even the probable ratio could not be stated, or estimated, and it was also conceded to be a matter of scientific record that that arsenic taken in life had remained in the body months after the taking and even nine months after.

Upon this crucial, vital and most important point, the judge in his charge, introduced upon his own authority, the alleged experiment upon a dog, poisoned by a dose of arsenic, which was administered for that purpose, and stated that after death no arsenic was found. There was no evidence of the truth of the facts claimed in the case of the dog, and no one can tell what the influence of that portion of his charge may have had on the mind of that jury.

It was clearly illegal and would alone in my opinion, secure a new trial in England, had it occurred in a civil action, when a verdict for money had been found by the jury.

OBJECTION 14. Mr. Justice Stephen knew that by the law of England, a trial judge had no right to allow a jury to know from his language, conduct or manner, what his personal and individual opinion as to the guilt or innocense of the accused was. In his address to the Grand Jury, he having this rule in mind, stated to them his determination to give no hint of his opinion. Still, in his charge, on the second day, by both his language, his conduct and his manner, he left not a man upon the jury in the slightest doubt that he believed that the accused was guilty. He changed his whole manner on the second day, his voice was loud and emphatic, and all the prejudicial points were pressed, reiterated, some of them several times.

OBJECTION 15. His charge on the first day was moderate, calm, judicial and fair, so low and moderate in tone, as to be at times, in some parts of the court room, almost inaudible.

It was eminently fair to the prisoner and was entirely impartial. He dwelt upon the fact that the jury was under British Constitution

the arbiter of the case, and disclaimed any intention to express any opinion of his own.

Sir Charles Russell had adopted the following order of questions to the jury:

1. Did the deceased die of arsenical poisoning?

2. Who administered it? — and had claimed that if there was equal authority on this point, in conflict that that issue was fairly a doubtful one, and the charge on the first day substantially adopted and approved of Sir Charles' position—but on the second day, with an entire change of voice, manner and conduct, he changed the whole tone of the charge, and he insisted in loud and stentorian tones to the jury, that the two issues above named were inseperable.

OBJECTION 16. He strongly commented on the fact that the accused had not brought as witnesses her school acquaintances from Germany, nor her mother, upon the question of the fly-papers and the use of arsenic as a cosmetic.

This would be a fatal error in any appellate court in the United States or on the continent of Europe.

If it had been well taken was the omission her fault or that of her counsel.

The foregoing are a few of the many points which appear objectionable in the charge. It is very lengthy, and many more objections could be raised, but lack of space prevents their recital here.

A careful review of the charge will show any unbiased mind that the general indictment formulated by the Committee of Women, of the Psychological Section, was well made and abundantly sustained. The publication of the full charge, we are glad to know, will shortly be made in London, so that it may be accessible to all.

The title of the work will be "The Maybrick Case, The Home Office and Criminal Appeal in England." Besides containing the evidence of the trial, and the charge, it will contain much other pertinent matter, and the subsequent proceedings with the Home Office,—and it is now contemplated to add to it essays from various countries outside of England on the state of their law, on criminal appeal, with illustrated cases and practical working.

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# GAMBLING CONTRACTS.

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In deciding a recent case (*Pardridge* v. *Cuttler*) the appellate court of Illinois in an opinion filed February 2, 1897, substantially re-affirms an old principle in reference to the question of intent, but it appears to be a most difficult principle to apply satisfactorily. In the case mentioned Cuttler sued Pardridge for losses incurred in the course of grain deals on the Board of Trade, and Pardridge made the defense that the transactions were gambling ones. The court held that in order to make this defense valid Pardridge must take the burden of proof upon himself and show that the transactions were of a gambling nature. In the majority of these cases proof necesssarily involves the question of intent, which is a broad one, respecting which there seems to be no clearly defined rule. It has been generally held that speculation in goods and property is lawful but when contracts are made apparently for the purchase and sale of property but in reality as a speculation in prices, the contracts are deemed to be unlawful and void.

If the understanding between the parties to such contracts is that no grain is to be received or delivered upon these trades, but that they are to be settled and disposed of by the mere payment of differences, then the transactions are gambling, illegal and void, on account of which no recovery can be had. (*Walker* v. *Johnson, 59 Ill., App. 448; West* v. *Wright, 86 Hun.* (*N. Y.*) *436; Lyon* v. *Culbertson, 83 Ill., 33; Beveridge* v. *Hewitt, 8 Ill., App. 467; Whitesides* v. *Hunt, 97 Ind., 191 S. C.; 49 Am. Rep. 141; Scott* v. *Brown, 54 Mo., App. 606; Billingslea* v. *Smith, 77 Md., 504; Dwight* v. *Badgley, 75 Hun.* (*N. Y.*), *174; First Nat. Bank* v. *Oskaloosa P. Co., 66 Iowa, 41; Gregory* v. *Wendell, 39 Mich., 337; Clay* v. *Allen, 63 Miss., 426; Johnson* v. *Kaune, 21 Mo., App. 22; Tantum* v. *Arnold, 42 N. J., Eq. 60; Kingsbury* v. *Kirivan, 77 N. Y., 612; Yerkes* v. *Solomon, 18 N. Y.*

*Supm. Ct.* (*11 Hun.*), *471; Waugh* v. *Beck, 114 Pa., St. 250; McGrew* v. *City Produce Ex., 85 Tenn., 572; Lowry* v. *Dillman, 59 Wis., 197; Irwin* v. *Williar, 110 U. S., 499; Cobb* v. *Prell, 15 Fed. Rep., 774.*) On the other hand whatever may have been the secret design and purpose of the customer where his broker purchases and sells grain or other commodity in such a manner, that delivery could have been completed, and with the purpose and intent of making real, not fictitious, transactions, actual sales and purchases, and not mere hazards as to rise and fall, the buying and selling being neither of "puts" or "calls" or "options", but of an actual existing commodity, the dealings are not illegal and a recovery may be had therefore. (*Pixley* v. *Boynton, 79 Ill., 351; Frost* v. *Clarkson, 7 Cow.* (*N. Y.*), *24; Bangs* v. *Hornick, 30 Fed., Rep. 97.*)

Gambling, whether in merchandise or stocks, should not be confounded with what is commonly called speculation. Merchants speculate on the future prices of commodities and buy and sell accordingly, and in this ofteu exhibit great mental grasp and knowledge of business. But when ventures are made upon the turn of prices alone with no bona fide intent to deal in the articles but merely to risk the difference between the rise and fall of its price; no capital invested except sufficient to cover the difference or margin, then the bargain represents a mere stake or wager upon its future price. (*Kirkpatrick* v. *Bonsall, 72 Pa., St. 155; Rumsey* v. *Barry, 65 Me., 570.*) Contemplation of the possibility of a settlement by payment of the difference between the contract price and the market value without any delivery of the merchandise is not sufficient to avoid the contract, if there is a bona fide intention to deliver. (*Kirkpatrick* v. *Adams, 20 Fed., Rep. 287; Gilbert* v. *Gauger, 8 Biss,* (*C. C.*) *214; Tomblin* v. *Cullen, 69 Io. 290.*) Where a contract between the parties is legal in form it is not enough that such contract is susceptible of an illegal use and that one of the parties to it contemplated such illegal use, if the other had reason to suppose that the contract was to have effect according to its apparent and legal construction. To render the contract invalid there must be a mutual intent of the parties to gamble. (*Pixley* v. *Boynton, 79 Ill., 351; Miller* v. *Bensley, 20 Ill., App. 528; Gregory* v. *Wendell, 39 Mich., 337; Frost* v. *Clarkson, 7 Cow.* (*N. Y.*), *24; Wall* v. *Schneider, 59 Wis., 352; Sawyer* v. *Taggart, 14 Bush* (*Ky.*), *727; Clark* v. *Foss, 7 Bis.* (*C. C.*) *540; Lehman* v. *Strassburgher, 2 Woods* (*C. C.*), *554.*) In *Williams* v. *Tiedmann* (*6 Mo., App. 269*) the court said: "It is manifest that in order to make a wager both parties must intend it

to be such. If one intends a bona fide sale or purchase while the other means only a gambling risk upon prospective differences there will be no propriety in depriving the former of the benefit of his contract because of a secret reservation in the latter." The fact that the buyer in a contract to purchase grain to be delivered in the future at a fixed price had no intention of receiving or paying for the same, but merely intended to bet on the state of the market, does not make the contract a gambling transaction if such intention was not made known to the other party. (*Warren* v. *Scanlan, 59 Ill., App. 138.*) But it has been held in Missouri that contracts for the sale of grain are void if one of the parties does not intend to receive or deliver the grain sold and the other is aware of his intent but does not share in it. (*Schreiner* v. *Orr, 55 Mo., App. 406; Connor* v. *Black* (*Mo. Sup.*) *33 S. W. 783.*)

It is presumed by the law that the true intent of the parties is that expressed on the face of the contract and also, that men in their business transactions do not intend to violate the law or to make contracts which the law will refuse to enforce. Therefore when one party alleges that the contract is infected with an illegal intent the burden of proof is imposed on him to establish this allegation. He, it is that insists that during these dealings, involving usually a large sum of money, he was engaged in what the law pronounces illegal, and upon which no recovery can be had; manifestly it is for him to adduce evidence sustaining such contention. (*Dykers* v. *Townsend, 24 N. Y., 57; Clay* v. *Allen, 63 Miss., 426; Barnell* v. *Baxter, 64 Ill., App. 544; Pixley* v. *Boynton, 79 Ill., 351; Rumsey* v. *Berry, 65 Me., 570; Teasdale* v. *McPike, 25 Mo., App. 341; Irwin* v. *Williar, 110 U. S. 499*; *Bangs* v. *Hornick, 30 Fed. Rep. 97*) and the intent of the parties is a question of fact for the jury (*Pope* v. *Hanke, 155 Ill., 617; Brand* v. *Luck, 48 Ill., App. 390; Ball* v. *Davis, 1 N. Y., St. Rep. 517*; *Bartlett* v. *Smith, 13 Fed., Rep. 267*; *Killman* v. *Simmens, 104 Cal., 595.*) Written contracts are not conclusive upon the question of good faith and parol evidence may be admitted to show the true intent of the parties, (*Killman* v. *Simmens, 104 Cal., 595; Cassard* v. *Hinman, 1 Bosw.* (*N. Y.*), *207; Yerkes* v. *Solomon, 11 Hun.* (*N. Y.*), *471*; *Fortenbury* v. *State, 47 Ark., 188*; *Stewart* v. *Schull, 65 Md., 289*; *Barnard* v. *Backhus, 52 Wis., 593*; *Melchert* v. *Am. U. Tel. Co., 3 McCrary* (*C. C.*), *521.*)

The intent of the parties is a question for the jury and it is the duty of the jury to take into consideration not merely the transactions themselves and what was said by the respective parties, their

agents and servants in arranging for these, but also the circumstances and surroundings under which the trading began and was carried on. The question is not merely what was said by the parties in regard to the transactions by which the broker or agent might have known or understood that his customer intended to gamble, but it is the duty of the jury to inquire what there was of which the broker or agent was bound to take notice concerning the intention and purpose of his customer, which the broker was carrying out. Thus the fact that the customer was not a dealer in grain, that he had no warehouse in which he could store it, cars in which he could ship it to another market, fields in which it could be grown or business in which it could be used; that he was a merchant carrying on a business other than that of which dealing in grain was a part; that nothing was made to appear to the broker by which he might understand that the customer was already under obligations to deliver large quantities of grain to other parties, and for the purpose of fullfilling such contracts desired, that purchases should be made upon the Board of Trade, it speculate there as one properly may, buying grain and holding it for an advance, but that his intention was merely to do that which the law pronounced gambling. It will be conceded that while any man may legitimately purchase grain upon the Board of Trade, and any broker may properly act as his agent, the thought of the broker as to what the actual intention of a party coming to him for assistance in so dealing, is, may vary with reference to the parties who so approach him. In *Pardridge* v. *Cuttler* the court says: "The country dealer purchasing grain from farmers who are bringing it to his warehouse, can hardly do so in safety unless contemporaneously therewith he sells upon the Board of Trade an equal amount; although at the time of such sale the grain is not there for delivery in accordance with the regulations of the mart. And with reference to orders from such dealers to sell, a broker may have no suspicion that anything other than a perfectly legitimate transaction is contemplated, but when a lawyer, a doctor, a minister of the gospel, a teacher or a drygoods merchant comes to a Chicago broker ordering transactions for purchase and sale upon the Board of Trade of grain for which he has no apparent use, the thought might cross the mind of the most unsuspicious of men, that there was an intention not to actually buy and receive or sell and deliver, but to speculate in what is known as "differences," to do that which the statute calls gambling, and if such transaction ordered by one of the class last mentioned, continuing through a series of years and

into millions of bushels without in some of the dealings there has been in but one instance an actual transfer of the grain — that for 10,000 bushels, the broker might well conclude, and that long before the dealings had continued for such time or reached such magnitude, that his principal's real purpose was to speculate and deal in points, and not to do such trading as is legitimate and proper. This is, however, a question of fact for the determination of the jury, and with reference to this it must be borne in mind that it is not what the customer intended, but what he and his broker designed. That is to say, what the customer intended and what the broker knew, or had notice, was designed and what the broker with such notice or knowledge willfully engaged in." Under such circumstances where the jury is properly instructed, its verdict upon this question is final. (*Curtis* v. *Wright, 40 Ill., App. 491; Graham* v. *Sadlet, 60 Ill., App. 522; Davidson* v. *Colburn, 54 Ill., App. 636.*) The intention of the parties may be shown by the nature of the transactions (*Gregory* v. *Wendell, 39 Mich. 337, 340*) or by the financial condition of the parties where the transactions are for an amount which the purchaser is utterly unable to pay. (*Beadles* v. *McElrath* (*Tenn.*), *3 S. W., Rep. 152*). The fact that the speculator's means are too narrow to enable him to have bona fide dealings of the magnitude of those in which he embarked may also be given in evidence for the purpose of showing the intention of the parties to gamble. (*Ruchizky* v. *DeHaven, 97 Pa., St. 202; North* v. *Phillips, 89 Pa., St. 250; In re Green, 7 Biss* (*C. C.*), *338*). The business transactions which have taken place between the parties, as dealings covering a long series of years may be shown as evidence of the intent. (*Grizewood* v. *Blane, 11 C. B., 526*). The nature of the particular transaction and the fact that the parties have made no preparation for the delivery of the goods nor any effort to obtain them may be shown. (*Melchert* v. *Am. U. Tel. Co., 3 McCrary* (*C. C.*), *521*). Similarly in speculative wheat deals the fact that no wheat was offered or demanded may be taken into consideration (*Lyon* v. *Culbertson, 83 Ill., 33*) and the fact that goods were sold "short" is also evidence of the intent, though that fact does not necessarily establish the gambling character of the transaction (*Maxton* v. *Gheen, 75 Pa., St. 168; Melhert* v. *American U. Tel. Co., 3 McCrary* (*C. C.*), *521; Rumsey* v. *Berry, 65 Me., 570*) and as has been shown the intent of the parties may be gathered from the attending circumstances. (*Schreiner* v. *Orr, 55 Mo., App. 406*).

Testimony as to the rules, regulations and usages of the Board

of Trade is properly admitted in cases of this nature. Where a party undertakes to deal upon the Board of Trade and knows that his transactions must there be conducted according to the rules and custom of that place, and employs a broker to act for him, he will be held as knowing and intending that the business would be conducted according to the rules and custom of that market, and this without reference to whether he in fact knew what the customs or rules of such place was. (*Curtis* v. *Wright, 40 Ill., App. 491; Lonegan* v. *Stewart, 55 Ill., 44; Bailey* v. *Bensley, 87 Ill., 566; Perin* v. *Parker, 126 Ill., 201; Samuels* v. *Oliver, 130 Ill., 73; Bibb* v. *Allen, 149 U. S., 481*).

It is held that closing deals on a Board of Trade by what is known as "ringing up" is not improper. "Ringing up" is nothing more or less than the setting off of one trade against another, a thing which occurs in great cities in mercantile transactions in about ninety-five per cent. of the entire volume of business. The closing up of transactions on the Board of Trade for the purchase and sale of grain, by setting off one trade against another, in the parlance of the exchange, "ringing up" is necessarily no more illegal or improper than is the setting off of credit balances by merchants through check and drafts. It is true that thereby the identity of the transaction upon the Board is lost; — thus A having purchased a thousand bushels of corn from B, and sold a thousand bushels of corn to C, if each transaction was closed out by a setting off of one account against the other, A then has a contract for the delivery of grain with neither. Such result is for his convenience and entails upon the customer no loss. (*Oldershaw* v. *Knowles, 6 Ill., App. 325.*)

Where the transactions involved in the suit have taken place on the Board of Trade or Stock Exchange, evidence that a very large proportion of all contracts made for the sale of grain, etc., thereat were settled by payment of differences and that nothing else was expected by the parties to them, is not admissible for the purpose of raising a presumption that the transactions in question were by way of gambling. (*Roundtree* v. *Smith, 108 U. S., 269; Bennett* v. *Covington, 22 Fed., Rep. 816.*)

As may be gathered from the foregoing decisions proof of the intent in the majority of cases of this nature is somewhat difficult and depends upon the particular circumstances connected with each case. The broker is sure to have entertained the intention to make the transactions legitimate by the actual receipt or delivery of the commodities at the end of the option, while on the other hand the customer who has lost and is trying to avoid payment is equally sure to have had the intention of settling on the market differences. It would be well were a clearly defined rule as to intent laid down and adhered to in cases of this nature.

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## NOTES.

As showing the difference between the practice in England and the United States, our article containing criticisms on the charge of of the court in the much discussed Maybrick case, will prove of interest. This article furnished to us through the courtesy of Clark Bell, editor of the Medico-Legal Journal, is carefully prepared, and as a brief on appeal from the judgment entered in the case, in almost any court in our country would be sufficient to set aside the conviction for error by the judge in his conduct on the trial.

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A bill has been introduced at Lansing requiring that all "Menu" cards or bills of fare in restaurants or hotels shall be printed only in the English language. Is the consideration of such a bill a matter for which the people of this state pay legislators? And in the title the worthy legislator himself uses the word "Menu." It is said that the reason for the introduction of the bill is a personal one. Our friend, the originator of the measure, was in Chicago a short time ago. The bill of fare was mostly in French. He started at the head and said to the waiter: "Give me some of that." He got soup. He skipped down the list a little way and tried again. He got another variety of soup. He was hungry and went pretty well to the bottom of the card and got toothpicks. You would have felt annoyed yourself.

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An act relative to the repeal of the "Mortgage Tax" law has been introduced in the legislature of our state; and in our opinion it cannot be passed too quickly. The law, as it stands on our stat-

utes, is an iniquitous one, its one redeeming feature being an utter lack of its enforcement.

The city of Detroit is the only place in which this law has been enforced, and the voices of its citizens are united against it in energetic and bitter denunciation.

By referring to our mortgage records and to the city assessment roles, one will readily observe that this mortgage tax law is very defective in the accomplishment of those results for which purpose it was enacted. True, taxes are now being collected, to use round figures, on over $5,000,000 worth of mortgages; yet when we stop to consider that there are existing mortgages on Detroit real estate to the amount of $30,000,000 more, which are not assessed on our tax rolls; this in itself ought clearly to show the absurdity, injustice and futility of this law.

One of the most distressing features of this law, moreover, and one which is obviously apparent to those examining the records, is the fact that the burden of this oppressive law has usually fallen upon those who are the least able to carry it; for it is significant to note that while the great proportion of the "taxed" mortgages is comprised of the mortgages of small amounts, ranging from $500 to $1500, yet the vast bulk of the "untaxed" mortgages are those for much greater sums, ranging upwards of $2,000. It is a comparatively easy matter for the experienced money loaner to evade this law. His usual method is to negotiate his loans through the banks or some non-resident, whom the law exempts from this taxation.

Another odious peculiarity of the mortgage law, is the fact that in most of the cases where these mortgages are taxed, it generally amounts to a double taxation, the one being the tax assessed on the mortgage, and the other against the full value of the real estate. There are even instances in which three assessments have been levied and actually collected on the same property, thus: A borrows $1,000 from B, for which he gives B a mortgage on a piece of real estate; and subsequently A invests the borrowed capital in a stock of goods for a store. Result: A pays taxes on his real estate for its full value, B is compelled to pay the tax on his mortgage, and A is further called upon to pay a personal tax on his newly acquired stock of goods. So we behold three separate and distinct taxes being collected on one and the same valuation; and yet, both parties are forced to pay these assessments without any recourse, while the state reaps all the benefits of this extortion.

As a natural result of the workings of this law, foreign or non-resident capital, being exempt from taxation is thereby placed at a decided premium, while our home capital is necessarily driven out.

We might go still further in discussing the evil effects of this law in other ways, to show its degrading influence on the community, but enough has already been said; and it is to be earnestly hoped that, before this present legislature adjourns, the existing mortgage tax law will be numbered among the dead.

## LEGAL MISCELLANY.

LIMITS OF FEDERAL AND STATE TAXATION. — If the States can not tax the agencies or instrumentalities by which the Federal Government performs its functions, it would seem clearly to follow that for like reasons the Federal Government can not tax state instrumentalities or agencies.

That such reciprocal limitations are natural and necessary, and exist by implication, not only in the constitution of the United States, but also in the very structure of the Federal Union, must be evident, when one reflects that otherwise the Federal government on the one hand, and the governments of the states on the other, might impose taxation to an extent that would cripple, if not wholly defeat, the operations of the two authorities, each within its respective and proper sphere of action. Or, in other words, if the Federal and the state governments had each unrestricted power to tax, or, what is equivalent, "the power to destroy," they might, and as experience proves they probably would, effectually destroy efficient government in both cases, and the necessity and validity of such reciprocal limitations have been recognized and enforced by the courts of the United States whenever this question has been brought before them for adjudication. Thus, in the case of *Day* v. *Buffington, United States Circuit Court, Massachusetts district*, it was held that the salary of a state official, in this particular instance a judge of probate, could not be legally subjected to assesement for an income tax, under the laws of the United States authorizing the assessment and collection of internal revenue; and Congress, some years since, acting under the advice of the United States Supreme Court, repealed so much of an internal revenue act as previously required the affixing of stamps to State processes, warrants, commissions, etc. — Hon. David A. Wells, in *Appletons' Popular Science Monthly for February.*

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A peculiar case of injury to lateral support by digging a sewer trench in a street and permitting quicksand and water to run into it, and then removing them by pumps, causing the surface of the land to crack and settle and injuring the buildings thereon, is held, in *Cabot* v. *Kingman (Mass.) 33 L. R. A. 45*, to make the sewer commissioners liable if they knew the nature of the soil or ought to have

known it, and did not require any unusual and extraordinary precautions to be taken by the contractor.

An excavation on one's own land without precaution to prevent the caving in of a neighbor's land is held, in *Gildersleeve* v. *Hammond* (*Mich.*) *33 L. R. A. 46*, to create a liability for damages to a building drawn into the excavation, and which did not by its pressure cause the land to fall.

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DISSATISFIED WITH THE PONY. — The opinion of Judge Wilkes in a late Tennessee case describes a tragedy and its consequences: — It was a suit on a note for a Texas pony described as "a small pony mare, well formed, with bright eyes and a remarkably active pair of heels." It appeared that on making the trade defendant was in the act of leading the pony away with an ordinary halter "when the plaintiff suggested that a 'slip halter' would suit the temperament and disposition of the animal better," and advised defendant "not to turn her loose or put her into a stable, but to tie her to a post until she was gentle." Strictly following directions, defendant next morning "came around to see if the pony was making any progress toward getting gentle and found her very quiet, — in fact she was dead. He says that he does not certainly know what caused her death, but thinks it was because 'she could not get her breath.' This seems quite probable, as the 'slip halter' was found to have 'slipped' down and become tightened around her nostrils." The defendant claimed that "he only took the pony on 'probation' for six months and by the contract had the right, at any time he was dissatisfied, to rescind the trade and deliver up the pony," and that while he did not offer to return the pony because he was prevented "by the act of God," "that when he saw that the pony had committed suicide he did not care to keep her any longer, and he therefore exercised his option to rescind the trade." Plaintiff insisted that it was the "act of the pony" which prevented the return, but the defense was held good, and the court said: "We think the weight of the proof was that the defendant was to have the right to rescind the trade at any time within six months, if he became displeased with his bargain, and, having exercised his option, we cannot say that he acted arbitrarily in becoming displeased after the pony had put an end to her further usefulness by means of the device furnished by the plaintiff."—*Case and Comment.*

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RECENT TELEGRAPH COMPANY LITIGATION — CIPHER MESSAGES NEGLIGENCE—PROXIMATE CAUSE. — In *Reed* v. *West. Union Tel Co.*, *37 S. W. Rep. 904*, the Supreme Court of Missouri holds that a telegraph company cannot, by contract, relieve itself from liability for negligence of its servants in the transmission of messages, overruling *Wann* v. *Telegraph Co.*, *37 Mo. 472*; that the distinction

between negligence and gross negligence is not recognized in Missouri. It was shown in this case that the message was not transmitted as it was written by the sender, and that the addressee acted upon it as received. It was held, that a *prima facie* case of negligence was established, placing the burden on the company. It appeared also that the message was delivered to the company at an office in the State of Iowa. It was held, that the contract was governed by the laws of Iowa relating to the liability of telegraph companies. Plaintiff's agent residing in Iowa delivered to a telegraph company a message addressed to plaintiff in Missouri, stating that certain real estate owned by plaintiff could be sold for $1,300 cash. The message, when received by plaintiff, gave the price offered as $1,900, and plaintiff immediately telegraphed her acceptance, and forwarded, deed by mail. Upon the receipt of plaintiff's answer accepting the price offered, the agent closed the contract of sale at $1,300. It was held that the negligence of the company would be regarded as the proximate cause of the loss of the difference between the price received and the market value of the lot.

In *Ferguson* v. *Anglo-American Tel. Co., 35 Atl. Rep. 979*, decided by the supreme court of Pennsylvania it was held that the rule as to the measure of damages confines the plaintiff's recovery in actions against the company for negligence to such as may fairly be supposed to have been in contemplation of the parties at the time of making the contract. This being true, it follows as a logical and necessary sequence that, where the message as delivered for transmission is unintelligible, except to the sender or the addressee, and the company had no information otherwise as to its character and purport, nor of its importance and urgency, the party injured can recover of the company nothing more than nominal damages, or at most the price paid for transmission. And this is the rule which has been adopted by the English and American courts almost without exception." Many decisions of the courts of this country and England are cited as sustaining the rule above stated. The numerous decisions of the courts of many states will be found to be opposed to the decisions of the courts of only three states—those of Virginia, Georgia and Alabama. Florida has recently reversed an earlier case, and thus joined the majority of the states on this question. The reasons advanced in support of the decisions which support the contrary ruling have been various, the one most commonly applied being the rule of *Hadley* v. *Baxendale, 9 Exch. 341.—Central Law Journal.*

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The supreme court of the United States has just held constitutional the Wright irrigation law of California. *Fallbrook Irrigation Dist.* v. *Bradley, 17 S. C. Rep. 56.* It will be recalled that Judge Ross of the U. S. circuit court for the southern district of California, at the hearing below, declared the statute invalid on the ground that it involved taking property for other than a public use, 68 Fed.

Rep. 498. It was claimed that "the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain," and a Federal question was thus raised under the Fourteenth Amendment, even although the taking was under the authority of a state instead of the Federal Government. The courts of the state of California had previously held the act valid. The supreme court, in an opinion by Mr. Justice Peckham, reversing the lower Federal court, holds that when the highest court of a state has decided that a certain statute is in harmony with the state constitution, a Federal court will not be justified in holding adversely on the ground that the decision of the court is in conflict with the general principles of constitutional law; that water used for the irrigation of lands which are actually arid is used for a public purpose, and, therefore, a statute providing for the irrigation of arid lands, and authorizing an assessment on such lands to pay the cost of the irrigation, does not deprive the landowner of property without due process of law, by means of an assessment not made for a public purpose, and that to render the use of water for the irrigation of arid lands a public use, every resident of the irrigation district need not have the right to use the water. If each landowner has the right to use a proportionate share upon the same terms as all the others, the use is a public, and not a private, one.

The substance of the conclusion of the court is to be found in the following language by Mr. Justice Peckam:

"Viewing the subject for ourselves, and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California. The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance, and over or through private property, which cannot be taken *in invitum* if the use to which it is put be not public; and, if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole* v. *LeGrange, 113 U. S. 1, 5 Sup. Ct. Rep. 416.* A private company or corporation, without the power to acquire the land *in invitum*, would be of no real benefit; and, at any rate, the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual. No one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and, unless they had the power of eminent domain, they could accomplish nothing. If that power could be conferred upon

them, it could only be upon the ground that the property they took was to be taken for a public purpose. While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus of the whole of the water, as he may choose."

The court also cites *Hager* v. *Reclamation Dist., 111 U. S. 701,* in which it was held that the power of the legislature of California to prescribe a system for reclaiming swamp land was not inconsistent with any provision of the federal constitution, saying that the two cases do not essentially differ. It is pointed out that such power of reclamation does not rest only upon the ground of preserving the public health.—*Central Law Journal.*

## BOOK REVIEWS.

INFALLIBLE LOGIC, A VISIBLE AND AUTOMATIC SYSTEM OF REASONING. — By THOMAS D. HAWLEY of the Chicago Bar. Robert Smith Printing Company, Lansing, Mich., 659 pp., $5.00 net.

This is a curious book for a reviewer to discuss. It means work for him and considerable of it, too. It is a book which without seeing into its covers one could praise or damn according to the mood he happened to be in, and be right in either case. The book is a good one; the book is not a good one. These two propositions are both true. As a system of logic, as a aid to deliberate reasoning, argument and controversy, it is undoubtedly of unusual value. As a practical aid to the solution of logical problems it may be valuable if one has time to sit down, make algebraic signs for the various terms of the proposition or propositions to be considered and put in application the suggestions and instructions contained in its pages. To apply its instruction to an argument before a jury for instance would be out of the question. It would be too cumbersome. It would be like a man travelling through tropical regions carrying with him for making his cup of coffee at meal times a coffee shelling, roasting and grinding mill. The book is a great advance over even the latest of philosophical works on logic and is destined no doubt to become a standard work on the subject of which it treats. It will never however be very widely read, as it is certainly not easy reading for the average man, and indeed is way beyond him. The system is briefly this: An ingenious application is made of the principle that in calling before the mind a given object we distinguish it from all other objects by recognizing the peculiar characteristics which go to make the object. Without any apparent thought we know a horse when we see it. We accept immediately the designation of any particular thing by its name as soon as we connect or associate the name and the thing. It follows of course that when we have in mind the idea of "horse" we are differentiating "horse" and "not horse." The positive idea of horse in this book would be represented by the capital letter "A" or "B," the negative idea would be represented similarly by the smaller letter "a" or "b."

In making deductions from any set of propositions these letters take the place of the actual terms to be considered, and by using a square sub-divided so as to contain as many smaller subdivisions as the combination of terms of the propositions to be considered are

capable of, and through the applicatian of a system of elimination we arrive at results expressed in letters which are capable of interpretation in terms, make up of the elements entering into the original propositions. The results are very certain but rather difficult to arrive at or at any rate are to be arrived at only after the expenditure of considerable time. To the student the book will prove interesting even if its influence on the next generation of lawyers will not be so great as to make them all logical in their treatment of cases, and in their argument of law points. And now from the work to the man. Thomas D. Hawley was for a long time a resident of Detroit, has served in our state legislature and in Detroit's Common Council. He is a brother of John G. Hawley of Detroit. To the consideration of the subject treated of in his book he has devoted several years of his life.

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A PRACTICAL TREATISE ON THE LAW OF RECEIVERS, WITH EXTENDED CONSIDERATION OF RECEIVERS OF CORPORATIONS.—By CHARLES FISK BEACH, JR., of the New York Bar. Second Edition, with elaborate additions to the text and notes and material changes therein, by WILLIAM A. ALDERSON of the St. Louis Bar. Published by Baker, Voorhis & Co., Law Publishers, 66 Nassau Street, New York. Price, $6.00 net.

This book is put upon the market in a very opportune time. The financial earthquake, which is now on, has smashed and is likely to ruin many fortunes and corporations, the remains of which must go into the hands of receivers, and unfortunately this book will be very useful in years to come, in pointing out the causes for the appointment of receivers, defences to the application, subject matter of receiverships, pleadings, practice and procedure, conflicts in appointments, jurisdiction of courts, powers, duties and liabilities of receivers, of individuals, partnerships and corporations, and especially in relation to receivers of railroads, in suits by and against receivers, their compensation accounts etc.,

The second edition by Alderson is the latest work on the subject of receivers. It contains much more matter than the former edition, and many changes have been made to express the law, as now interpreted by the best judicial decisions. Many new questions have been discussed, and determined by the weight of authorities. Special consideration has been given to matters of practice, The final chapter is new, and will afford the practitioner great assistance in the principles and practice under the law of receivers and the mode of procedure in receivership litigation. The revisor has not only expounded the law concerning receivers of corporations, but he has discussed the law of receivers, private curporations, and individuals, in detail, so that the work is adapted to the whole range of the law of receivers.

Although the author confines his discussions generally to the common law pertaining to receivers, yet he brings out many of statutory provisions relating to receivers, and their powers and duties under the various statutes, the practice under the same, and espec-

ially their limitations under the various statutes under which they are appointed. The first edition of this work was valuable, but this second edition has brought the law of receivers down to date, retaining all the best of the old, and adding to it the modern law as it has grown up in these days of steam and electricity, as used by great corporations and private individuals. The work is a necessity to the practitioner.

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A TREATISE ON THE LAW OF FIRE INSURANCE, WITH A PHILOSOPHICAL AND ANALYTICAL DISCUSSION OF LEADING CASES. — By D. OSTRANDER. Second Edition revised and enlarged. Published by West Publishing Company, St. Paul, Minn.

The law of fire insurance, to a limited extent, has grown out of the common law, but as it now exists, it is principally a growth of modern times. Formerly only the few insured property against loss by fire. Now the practice has become almost universal. The rich and the poor alike seek protection by paying a small sum to secure from great loss and ruin. In order to successfully carry on the business of insurance, it became necessary for the insurer to have a large amount of capital, to inspire confidence in the insured, and assure him all losses would be promptly paid. This fact gave rich corporations a monopoly in the insurance business, and they did not hesitate to take every advantage possible of the insured; in the conditions exceptions and forfeitures attached to their policies, and hence a great proportion of the litigation of the country arose on policies of insurance. It therefore early became necessary to regulate and control their dealings with the people, by stringent and well defined laws. The legislatures of the various states found the common law of contracts inadequate to afford sufficient protection from the insurance companies and they long ago enacted statutes to control the policies and contracts of the insurance companies with the insured, and now, almost all the states to a great extent, regulate and control the business of fire insurance companies by statute.

A policy of insurance is so unlike the ordinary contract in many of its provisions that contentions often arise concerning its scope and interpretations, when the unexpected and unprovided for, happens. The author has presented, in a familiar manner the complicated and blind insurance contracts, with such illustrations of legal rules and principles, that they may more easily be understood.

The book is divided off into sections, and the substance of each section is consisely set forth by heavy faced type, in the usual style in the later law books, and the subjects are thoroughly indexed. The practitioner who has any cases involving insurance contracts, ought of course, to have this revised edition, not only for a full commentory on the law of fire insurance, but for the citations of all the leading cases on the important points of law, therein discussed.

# CURRENT LITERATURE.

*The Review of Reviews* for February proved interesting, although the editorial department the Progress of the World did not contain such stirring news as has been our regular diet for several months past from the same heavily loaded table. This however is not caused by deterioration in the treatment of the subjects of interest and matters of news but fairly by the fact that nothing especial had happened during the month treated of. We will await with interest the forthcoming number which in the same department will give us accurate accounts of Turkey's troubles and of the present attitude of the great European process towards Greece, which in its occupation of the island of Crete has stirred up such a row in the family of nations. Two sketches of Gen. Francis A. Walker; a sketch of Rudyard Kipling and another of Browning together with the regular departments makes up the number.

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The timeliness and energy of the *Atlantic Monthly* are shown by the announcement that its March number will contain a review of Mr. Cleveland's two administrations by Woodrow Wilson. Mr. Wilson of course writes from the point of view of a non-partisan student of public affairs in their larger aspects. After reviewing the principal events with which Mr. Cleveland has had to do, he undertakes to assign him his historical place among our Presidents. According to Mr. Wilson's estimate, Mr. Cleveland is the most robust personality that has entered our political life since Lincoln. The decline in efficiency of legislative bodies will also be discussed in an article by Mr. Francis C. Lowell, who writes by the light of his own experience as a member for two terms of the Massachusetts House of Representatives. Mr. Lowell carefully analyzes the hindrances to legislative efficiency and dignity, and proposes simple and fundamental remedies. These two articles ought to interest lawyers.

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The weekly issue of *The Living Age*, bearing date Feb. 13, is the Monthly Supplement number, and including the supplement, contains 96 pages. Among its most strieing features are "All Souls' Eve in Lower Brittany," a delightful sketch of the customs and folk-lore of the Breton peasants, translated for *The Living Age* from the French of Anatole le Braz; the first part of "The Land of Suspense," Mrs. Oliphant's latest story of the seen and unseen; a passage from Mrs. Steel's stirring story of the great mutiny, "On the Face of the Waters"; Herbert Spencer on "The Fallacies of Socialism"; a discussion of "Political Ideas and Realties in Spain," by Emilio Castelar, translated for *The Living Age;* and a paper by W. Holman Hunt on "Religion and Art."

The "Monthly Supplement," giving Readings from American Magazines, Readings from New Books, and a List of the Books of the Month, adds a valuable feature to *The Living Age*, which its readers will be quick to appreciate, and with the translations from eminent continental authors, on prominent questions of the day, fairly doubles the value of the magazine. The Living Age Co., Boston, are the publishers.

*Appleton's Popular Science Monthly* for February takes the occasion of the recent completion of the Synthetic Philosophy to publish an appreciative account of Herbert Spencer: "The Man and his Work," by Prof. William Henry Hudson, who was at one time intimately associated with the philosopher in his literary labors. Prof. Hudson explains the leading principles of Spencer's philosophy, and tells how the great work has been brought to completion. Prof. Wm. Z. Ripley begins in this number a series of papers on "The Racial Geography of Europe," which he opens by showing why racial limits are seldom the same as national and linguistic boundaries. Of ethnological interest also are the articles on "Indian Wampum Records" by the late Horatio Hale, and the illustrated account of "Some Primitive Californians," by Mary Sheldon Barnes, in which the results of exploring a particnlarly fruitful Indian mound are given. David A. Wells writes this month on the sphere of taxation of the United States Government, showing how it limits the taxing power of the individual States. Sophia Richardson discusses certain "Tendencies in Athletics for Women," showing how exercise and especially earnestly played games aid the mental work of college girls The biographical Sketch and Portrait this month are of especial interest to women, the subject being the American astronomer Maria Mitchell. There is also an account of The Scientific Work of W. D. Gunning, with a portrait. In his series of psychological articles Prof. William R. Newbold discusses "The Interpretations of Automatism," showing what are the usual arguments for maintaining the dependence or independence of mind and body. Another phase of the subject, "Plural States of Being," is considered by Alfred Binet. W. S. Blatchley tells "How Plants and Animals spend the Winter," pointing out the ways they have of avoiding or protecting themselves against the cold. Albert Gaudry shows the close relations between the animate world of to-day and that of early geologic ages. Dr. Edward F. Brush urges the abandonment of the idea of punishing criminals. The departments present many minor items of interest.

# MICHIGAN LAW JOURNAL.

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## *BRIEF OF C. D. JOSLYN IN MORELAND vs. COMMON COUNCIL OF DETROIT.*

STATE OF MICHIGAN.

SUPREME COURT.

DEWITT H. MORELAND,
Plaintiff in Certiorari,

vs.

THE COMMON COUNCIL OF THE CITY OF DETROIT,
Defendant in Certiorari.

This is a proceeding by the relator as a citizen and elector of the City of Detroit, wherein he invokes the aid of this Court to right what he alleges to be a public wrong.

He has no interest beyond that of any other citizen in the City of Detroit.

The wrong complained of is that the Common Council refuses to order a special election to fill a vacancy which he alleges now exists in the office of Mayor.

It appears from the petition and answer that the people of the

City of Detroit in the fall of 1895 elected Hazen S. Pingree, Mayor of the City of Detroit, to take and hold his office from the second Tuesday in January, 1896, to the second Tuesday in January, 1898, and that in the fall of 1896 the same people, together with a large majority of their fellow citizens in other parts of the state, with a full knowledge that said Pingree would undertake to hold both offices, elected him also to fill the office of Governor of the state, to take and hold this office from January 1st, 1897, to January 1st, 1899.

That said Pingree is fully executing the office of Mayor and performing all the duties required by law to be performed by said officer.

The charter of the City of Detroit provides that if a vacancy occurs in the office of Mayor more than six months before the time for holding the next succeeding annual election, the Common Council shall order a special election to fill said vacancy; but if the vacancy occurs less than six months before such regular election it *may*, in its discretion, order such special election.

It appears that there is no necessity for a special election beyond the direction of the statute, and that no rights of any individual or class of persons are jeopardized, or will be jeopardized, by a failure of the respondent to order a special election.

The said Pingree took the office of Mayor at the appointed time, and now holds the same in fact; he is performing all the duties of the office to the satisfaction of those who elected him, with the possible exception of the relator. He also took the office of Governor, at the time required by law, and is now executing the duties of that office.

The Court is now asked to discover some technicality by which the will of the people can be defeated.

The claim is that the offices of Governor, and Mayor of the City of Detroit, are incompatible, and that Mr. Pingree, having accepted a second office incompatible with the first, he thereby vacated the first.

Our position is:

First—The Court has no jurisdiction over the parties.

Second—The offices of Governor of the State and Mayor of the City of Detroit are not incompatible, whether the statute giving the power to remove the Mayor is or is not constitutional or applicable.

Third—This is an attempt to oust a man from office without making him a party to the proceedings, and for that reason cannot be done.

Fourth—It is also an attempt by the relator to put a third party

into the office with the aid of a writ of mandamus, which cannot be done.

Fifth—There is no real or pressing necessity for a special election and, for this reason, the writ being a discretionary one, ought not to be granted.

I.

A PRIVATE PERSON WHO IS NOT SPECIALLY AFFECTED OR INJURED CANNOT INVOKE THE AID OF THE COURTS TO REDRESS A PUBLIC WRONG.

This doctrine is so fully and firmly established in this State that discussion is not only not necessary but would be impertinent.

The case at bar illustrates, better than almost any that could be imagined, the reason of the rule.

II.

THE OFFICES OF GOVERNOR OF THE STATE AND OF THE MAYOR OF THE CITY OF DETROIT ARE NOT INCOMPATIBLE.

A brief in the case brought in the name of the Attorney General enlarging on this point has been presented to the Court. It is too long to be printed in full, but a portion of it follows this brief.

Section 653 of Howell's Annotated Statutes provides as follows:

"The Governor may remove all county officers chosen by the electors of any county or appointed by him, and shall also remove all justices of the peace and township officers chosen by the electors of any township or city, or village officers, chosen by the electors of any city or village, when he shall be satisfied from sufficient evidence submitted to him, as hereinafter provided, that such officer is incompetent to execute properly the duties of his office, or has been guilty of official misconduct, or of wilful neglect of duty, or of extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it shall appear by a certified copy of the judgment of a court of record of this State that such officer after his election or appointment shall have been convicted of a felony; but the Governor shall take no action upon any such charges made to him against any such officer until the same shall have been exhibited to him in writing, verified by the affidavit of the party making them, that he believes the charges to be true, with a statement of the prosecuting attorney of the county, that in his opinion the case demands investigation. But no such officer shall be removed for such misconduct or neglect unless charges thereof shall have been exhibited

to the Governor, as above provided, and a copy of the same served on such officer, and an opportunity given him of being heard in his defense."

It is claimed that this general power to remove elective officers of cities and villages applies to the City of Detroit, which has a special charter with full provisions for the removal of its officers, and therefore the Governor may remove the Mayor of Detroit.

This is the main ground of the claim of incompatability.

(a) *The act above quoted is not applicable to the City of Detroit.*

The charter of the City of Detroit contains ample provisions for the removal of all its elective officers save the Mayor.

The judge of the Recorder's Court is a constitutional officer, and, of course, may be impeached in the same manner as other judicial officials.

Section 18 of chapter 4 of the charter provides that the Common Council may, by a two-thirds vote, remove from office any of its own members or any other officer holding office by election, except the Mayor and Recorder, for corrupt or wilful malfeasance or misfeasance in office or for wilful neglect of the duties of office.

Provisions are also made either in the charter or the laws relating to Detroit for the removal of all appointive officers in said city.

So that if the general statute is applicable to the City of Detroit we have two utterly inconsistent and *incompatible* methods of removal of the officers of said city. Counsel must find some way to make these methods *compatible* before they can safely assert that the two offices in question are *incompatible.*

There can be no greater absurdity imagined than that both the Governor and the council can remove the same person for the same cause. Suppose the council should remove and the other should refuse to remove some officer, the City Clerk for instance, who is clerk of the Common Council, whose action would be valid and binding?

Can it be conceived that the City Clerk should still act as clerk of the Common Council? Or suppose we reverse the situation and the Governor should undertake to remove the City Clerk and the Common Council should also try him and refuse to remove, would the Governor's action create a vacancy in the office of the City Clerk and render it oblegatory upon the council to appoint someone to fill the vacancy, under section 25 of chapter four of the City Clerk?

What would hinder the council from appointing the man who had just been removed (?) by the Governor?

Is it not too clear for argument that the general statute and the special charter provisions are conflicting and irreconcilable and that the charter provisions must govern? Any other view would lead to the direst confusion.

The only way to give force and effect to the charter provisions and the general law at the same time, is to hold that the latter was not intended to be applicable in cases where the charter provisions are made to cover the subject of removals.

But it is claimed that such a construction will leave the City of Detroit without any provision for the removal of its Mayor.

Very true. From 1893 to 1895 there was no provision whereby the City Counselor of Detroit could be removed and this Court suggested that it was not unreasonable to infer that the Legislature intended to place that important office beyond the control or fear of any other department.

Speed vs. Common Council, 98 Mich., 370.

May not the language used there, with reference to the omission, well be applied here?

If the provision for removal of the Mayor be a necessary one, there is nothing to prevent the Legislature from meeting the necessity.

(b) *The provision that the Governor may remove elective officers of cities and villages is unconstitutional and void.*

This proposition would be conceded but for the provisions in section seven, article twelve, of the Constitution, which is as follows:

"The Legislature shall provide by law for the removal of any officer elected by a county, township or school district in such manner and for such cause as to them shall seem just and proper."

It will be noted that cities and villages are not in the enumeration, and by all rules of construction therefore the power is not extended to them.

It is significant that the constitutional convention of 1867 noted the absence of the words "cities and villages" in the Constitution of 1851 and inserted them in the Constitution adopted by it. The language is as follows:

"County, township, *city, village* or school district officers may be removed in such manner and for such cause as may be provided by law."

The proposed Constitution of 1873 also contained the same provision.

It is quite evident that the framers of the Constitutions of 1867 and 1873, so called, did not think the provision in the Constitution of 1851 was sufficient to warrant the removal of officers of cities and villages by other than local authorities.

Section 14 of Article 15 of the Constitution provides that "Judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the Legislature may direct."

The power of the Legislature is made fully as broad in this section as in section 7, Art. 12, which is supposed to give power to provide for removals by the Governor.

One provides that officers may be elected or appointed in such manner as the Legislature may direct, the other that the same officers may be removed in such manner as the Legislature may provide.

Under the former the Legislature directed in a certain case that the manner of appointment should be by itself; under the latter it has directed that the manner of removal shall be by the Governor.

The former has been held repeatedly to be an invasion of the right of local self-government.

People vs. Hurlbut, 24 Mich., 44.
Attorney-General vs Lothrop, 24 Mich, 235.
People vs. Common Council, 28 Mich., 227,

and other cases.

The reasoning in these cases applies with equal force to the statute giving the Governor power to remove officers of cities and villages. It is as much an invasion of the right of local self-government for some outside power to remove a city officer as it is to appoint one. If the Governor may undo an election by removing the person elected, of what value to the locality is the right to elect?

Counsel in the court below cited,

State vs. Peterson, 52 N. W. Rep., 655,

in support of the constitutionality of the statute giving the Governor power to remove, but it has no bearing whatever.

It was a Minnesota case. The Constitution of that State on this subject is as follows:

"The Legislature of the State may provide for the removal of inferior officers from office for malfeasance or nonfeasance of their duties.

It will be seen that the power conferred was as to *all* inferior

offices. Under this, it was held that the Legislature had authority to vest the power of removal of inferior officers, in the Governor. I can hardly see how it could have been held otherwise.

Had the Constitution of 1867 been adopted, our Legislature would have had its power extended to cities and villages and the present statute would have been constitutional. But the Constitution of 1851 does not give the power and it, therefore, does not exist.

I come now to the main question of incompatability and, for the sake of argument, treat the general statute as constitutional and applicable.

Incompatibility means more than a mere disqualification to act in some one remote contingency which has never happened, and probably never will happen.

It means an inconsistency in the functions of the two offices.

It may well be doubted, if the doctrine of incompatibility was ever intended to be applied in a case where one is a state and the other a municipal office. The two offices are entirely different in character.

The office of Mayor of Detroit is purely and wholly municipal in its character. He has no duties to perform, under the general laws applicable to the whole state. Neither has the Governor any duties to perform under the Detroit charter or under the laws relating to the City of Detroit. The duties of Mayor of Detroit are in no way inconsistent or in conflict with the duties of Governor.

The duties of Governor are in no way inconsistent, or in conflict with the duties of Mayor of Detroit, save in the single remote contingency that he may be called upon to remove the Mayor, assuming the statute to be applicable and valid, and from the very nature of the two offices there can be no such incompatibility as the law contemplates is necessary to prevent the holding of both.

There are a number of cases holding that municipal offices are not offices "under the state." I cite:

State vs. Kirk, 44 Ind., 405.
Mohan vs. Jackson, 52 Ind., 599.

As to the doctrine that there is no incompatibility between a state or constitutional office and a municipal office, I cite:

Dorsey vs. Vaughan, 5 La. Ann. 155; 6 Ann., 516.
State vs. Somers, 33 La. Ann., 237.

Courts never extend restrictions against the people any further than they are obliged to. There is nothing in the constitution, noth-

ing in the statutes, to prevent holding more than one office, except in specific instances. The people of this state have not restricted themselves from voting two offices to the same person, if they wish, except in a very few instances.

It is worthy of note that in many other states the self-imposed restrictions in this direction are far more numerous than in our own state.

It is not to be wondered at when we come to consider the history of Michigan that the people have made the restrictions upon their electoral rights as few as possible.

While they were under French and English rule they had no electoral rights worthy of the name and they did not gain much under territorial rule, nor under the first state constitution. Under the latter they had a right to vote for Governor and members of the Legislature and that was about all as far as the state was concerned.

The constitution of 1851 was in reality the first establishment in Michigan of a peoples' government. In it the restrictions upon their electoral rights are few.

Why was it necessary to provide in the constitution that no person holding any office under the United States, or any county office, etc., ..... shall have a seat in either branch of the Legislature and that all votes given for such person shall be void?

Counsel upon the other side, in his brief before the court below, said, in order to avoid the force of the argument, that the provision was made because otherwise a county officer might be a member of the Legislature: "The constitution simply recognizes the common law doctrine that the duties of members of the Legislature and of the Governor in the exercise of the legislative power of the state are incompatible with the duties of state, county and municipal offices."

Just why he inserted the word "municipal" is not easy to guess, because there is not, I think, in all the books, any intimation that at common law a municipal office is incompatible with a state office.

But it is not clear that the framers of the Constitution thought that the doctrine of incompatibility would not prevent a double holding of the offices mentioned, and therefore inserted the restriction in the Constitution itself?

Why was it necessary to provide in the Constitution that a sheriff should not hold any other office?

There are a number of provisions in the charter of, and the laws relating to the City of Detroit prohibiting the holding of more than one office.

In every State there are both constitutional and legislative provisions against holding two offices.

The leading case cited by counsel is one which arose under a charter provision making an election to *any* other public office, an absolute vacation of the office of alderman. In fact, nearly all the cases of incompatibility that have arisen in this country have come up under similar restrictive provisions, either legislative or constitutional.

Do not these show that in this country, at least, the people have an inherent right to elect as they please to more than one office, which can only be taken away by the self-imposed restriction?

I know of no exception to this broad rule.

I am not unmindful of the few cases—one of which was recently decided by this Court—where the common law doctrine of incompatibility has been applied in cases where only a few people have been concerned, or have exercised the electoral franchise, such as a school district or a township, and then only in cases of minor offices, but as I view the question these cases do not amount to an exception to the rule.

The holding of two offices by one person is a common thing in Michigan. Numerous instances of such holding will readily occur to the Court. Although the Constitution prohibits a sheriff from holding any other office, yet this Court has held that a deputy sheriff may hold the office of supervisor.

People vs. Gosch, 82 Mich., 22.

For many years that upright citizen and able jurist, Justice Campbell, held a seat on this bench, and while so holding it, was elected a member of the Library Commission of Detroit.

Had any litigation arisen over some action of the Library Commission and the case had reached this Court Justice Campbell, in that instance, would have been disqualified from performing his duties as justice of this Court, but can any sane man say that the single disqualification to act made the two offices incompatible so that the acceptance of the office of Library Commissioner of Detroit *ipso facto*, or in any other way, vacated his office of Justice of the Supreme Court?

Judge Hosmer, of Detroit, now holds the office of Library Commissioner of Detroit. That he may be disqualified from sitting as judge, in a case involving some act of his as Library Commissioner, is not by half so remote as that the Governor will be qualified to

remove the Mayor of Detroit. Yet does anyone believe that he vacated the office of Circuit Judge, which he fills so ably and acceptably, by accepting the office of Library Commissioner?

I merely use these illustrations to show that a mere disqualification to act in some possible but improbable contingency does not amount to an incompatibility.

The disqualification to act in some particular case is a contingency provided for by the Constitution.

Sec. 12, Art 5.

"In case of the impeachment of the Governor, his removal from office, death, *inability*, resignation, or absence from the state, *the powers and duties of the office* shall devolve upon the lieutenant, for the residue of the term, *or until the disability ceases.*"

If Mr. Pingree's son were Mayor of Detroit, Mr. Pingree, as Governor, would be as much disqualified to take action as against himself as Mayor, and in either case because of his "inability" the Lieutenant Governor would be compelled to act, and the office of Governor would thus be fully and fairly executed, precisely as in the case of Judge Hosmer some one else would be capable to act for him in a case where he was disqualified.

But it is said that Governor Pingree may be called upon to approve or disapprove a bill raising his salary as Mayor or bills increasing or decreasing his patronage as Mayor.

Arguments of this nature show the trivial character of this case.

There is not a session of the Legislature that the Governor is called upon to approve or veto measures increasing or decreasing his own patronage. On July 2d, 1889, Governor Luce affixed his signature and thus made into law a bill raising his own salary as Governor from one thousand to four thousand dollars.

Governor Pingree may be called upon to approve or veto a bill placing the salary of his office back to one thousand dollars. What of it? Is this case to turn upon such small, narrow considerations as these?

Are the people to be disfranchised and their will defeated by such trivial considerations? I cannot believe it.

## III.

THERE IS NO REAL NOR PRESSING NECESSITY FOR A SPECIAL ELECTION, AND THE WRIT BEING A DISCRETIONARY ONE, OUGHT NOT TO BE GRANTED.

Suppose the provision of the charter relative to ordering a special election is mandatory, which is not by any means certain, and that the council refuse to obey it, who is injured? No harm is done. At best it is only a technical violation of the charter without jeopardizing the rights or interests of a single person or of any class of persons.

Who will be injuriously affected by the delay, if no election be held until next November? The relator points out no one, and there is no one.

The wrong here complained of, even assuming that there is an actual vacancy, is purely technical. So far as citizens are concerned, it makes no practical difference to them whether the vacancy is a few days more than six months, or a few days less. It happens to be a few days more and because of it, the Court is asked to issue a discretionary writ to enforce an alleged wrong, "of a character merely technical."

Attorney-General vs. Detroit, 26 Mich., 264.

Neither the people of Detroit nor the people of the state are asking for this writ.

The people have already spoken. They have made their decision, and made it understandingly. It is only those who seek to overturn and defeat that decision that now ask for the writ. The most they can hope for is temporary success because the voice of the people, like Truth, is mighty and shall finally prevail.

C. D. JOSLYN,

*For Defendant in Certiorari.*

## *EXTRACT FROM BRIEF OF C. D. JOSLYN IN ATTORNEY-GENERAL vs. COMMON COUNCIL OF DETROIT.*

STATE OF MICHIGAN.

SUPREME COURT.

ATTORNEY GENERAL OF MICHIGAN

vs.

THE COMMON COUNCIL OF CITY OF DETROIT.

There are many cases which hold that municipal offices are not "offices under the State."

State vs. Kirk, 44 Ind., 405.
Mohan vs. Jackson, 52 Ind., 599.
Dorsey vs. Vaughan, 5 La. Ann., 155; 6 Ann., 516.
State vs. Montgomery, 25 La. Ann., 138.
State vs. Somers, 33 La. Ann., 237.

Besides cases already commented upon, and not a single one holding the contrary. There is not an intimation, not a dictum anywhere in any case or text-book which even suggests that a municipal office is an office "under the State."

Counsel avoid the logic of their argument. If their contention is sound that the office of Mayor of Detroit is an office "under the State," then it certainly follows that H. S. Pingree is not Governor.

The proposition that by accepting the office of Governor he vacated the office of Mayor of Detroit under Section 15, Art. V., of the Constitution is wholly untenable and unsound.

The section is as follows:

"No member of Congress, nor any person holding office under the United States, nor this State, can execute the office of Governor."

There is no good reason to suppose that the language does not mean *exactly* what it says, instead of the exact opposite as claimed by counsel.

The Constitution says that these several officers shall not execute the office of Governor. Counsel say that the Governor shall not execute the several offices.

Where is the power of this State, or this Court, to declare a United States office vacant? It does not and cannot exist. So that as far as members of Congress and other United States officers are concerned, they cannot be vacated by the force of a constitutional provision. With respect to United States officers, it is certain that the Constitution means exactly what it says. Why not, then, with reference to State officers?

The conclusion is irresistible, and we may as well face it, that if the office of Mayor of Detroit is an office under this State, Mr. Pingree cannot execute the office of Governor and therefore Chas. R. Sligh is now de jure Governor of Michigan.

But counsel also claim that the offices of Mayor of Detroit and Governor at common law are incompatible.

If this be true, then Mr. Pingree by accepting the office of Governor has vacated the office of Mayor.

The final logical result of the entire position of counsel that the two offices are constitutionally and at common law incompatible is, that Mr. Pingree is neither Mayor of Detroit nor Governor of Michigan, and that a very large majority of the voters of Michigan are disfranchised.

Does not this conclusively show that there is something radically wrong somewhere in their contention?

Will this Court follow their propositions to their logical and inevitable conclusion?

If not, where will it stop?

I am not unmindful that the theory sought to be enforced is that the people are presumed to know the law and that therefore, when they voted for Mr. Pingree for Governor, they knew that his election and acceptance would vacate the office of Mayor or that their votes for him for Governor would not count, or perhaps both.

This is the legal fiction by which the people are to be cheated out of their choice. I am aware that this is strong language to be

used in this Court and that it ought not to be loosely used or without proper occasion, but as I view the case, it expresses the exact situation.

That the theory is really a fiction is beyond a question. That the people did not in fact solve any such questions of law cannot be denied. To assume in this case that they did will result in their actual disfranchisement.

This Court will take cognizance of passing history. However wide a difference of opinion there may be as to the wisdom of the public policy that has been pursued in Detroit for the last seven years by Mr. Pingree, there can be none whatever that it has been the policy demanded and approved by the people. And I here take occasion to say that when I speak of the people I do not refer to the agitators nor the discontented ones who seek to stir up strife; but to the great class of industrious, quiet, sober-minded citizens whose judgment and vote is the strength and salvation and hope of the republic.

To disfranchise them by a legal fiction, is to establish a doctrine fraught with the most dangerous consequences.

So far in our nation's history it has been the judiciary which has always stood as the bulwark of the people's rights and liberties.

As I said upon a former argument of this question, this is no question of dollars and cents. It is not strictly or narrowly speaking a question of law. It is a governmental question—a question of public policy.

The matter of the expense of an election has no place in the discussion of such a question.

If the other side is worrying over such a matter, it only serves to show that it places the question of money above that of human rights. It is considering the small things and not the great.

It is better, far better, that the people of Detroit, the people of the whole State go without an election for a generation than by a hasty decision be deprived for all the years to come of their freedom to elect whomsoever they will for their chief executive.

C. D. JOSLYN,

*For Respondent.*

## *MORELAND vs. COMMON COUNCIL OF THE CITY OF DETROIT.* *

I.

The provisions of the constitution of this state bearing on the question whether the offices of governor of the state and mayor of a city can both be held at one and the same time by one person, are as follows:

"No person holding any office under the United States or this state, or any county office, except notaries public, officers of the militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature, and all votes given for any such person shall be void." Art. IV, Sec. 6.

"No person elected member of the legislature shall receive any civil appointment within this state, or to the senate of the United States, from the governor, the governor and the senate, from the legislature, or any other authority, during the term for which he is elected. All such appointments, and all votes given for any person so elected for any such office or appointment, shall be void. No member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any county thereof, authorized by any law passed during the time for which he is elected, nor for one year thereafter." Art. IV, Sec. 18.

"No member of congress, nor any person holding office under the United States, or this state shall execute the office of governor." Art. V, Sec. 15.

The mayor of a city is an officer "under this state," within the meaning of the constitution.

Shelby vs. Alcorn, 36 Miss., 273, 292.
State vs. Valle, 41 Mo., 29, 31.
Montgomery vs. State, 107 Ala., 372.

* This is in substance the brief of the relator Moreland, but its application was made to apply to the later case of the Attorney General.

Although elected by a locality, the mayor of a city as to some of his most important duties is a state officer.

2 How. Stat., section 9264.
Miner vs. Shiawassee Supervisors, 49 Mich., 602.

The state legislature, subject to the qualified veto of the governor, has power to define the duties and authority of all state, county and municipal officers, and to fix, with certain exceptions, their salaries. The constitution simply recognizes the common law doctrine that the duties of members of the legislature and of the governor in the exercise of the legislative power of the state are incompatible with duties of state, county and municipal officers.

There are now pending in the legislature bills to increase the power of the mayor of Detroit so he can remove any city officer at his pleasure, and also to increase his salary. The constitution of the state contemplates that members of the legislature in passing on these measures shall not be actuated by personal interest, and that the governor of the state, in granting or withholding his approval, shall not be influenced by personal considerations, and that he shall not use his influence as governor with members of the legislature to increase his power in a subordinate office, or to add to his emoluments as the incumbent of any such office.

The provision that no person holding any other office under this state shall execute the office of governor is an old and wise provision that has come down to us from the fathers of the republic.

The second constitution of Pennsylvania adopted in 1790 contains these words:

"No member of congress or person holding any office under the United States, or this state shall exercise the office of governor." Art. 2, Sec. 5.

This provision was retained in the Pennsylvania constitutions of 1838 and 1873. 1838—Art. II, Sec. 5; 1873—Art. IV, Sec. 6.

Delaware adopted the provision in her constitution in 1792. — Art. III, Sec. 5.

It is also to be found in the Kentucky constitutions of 1792 and 1799. 1792—Art. II, Sec. 5; 1799—Art. III, Sec. 6.

Ohio adopted it in 1802. Art. II, Sec. 13.

Indiana in 1816. Art. IV, Sec. 5.

Maine in 1820. Art. V, Sec. 5, part first.

New Jersey adopted it in 1844 with an additional clause:

"No member of congress or person holding any office under the United States or this state shall exercise the office of governor, and

in case the governor or person administering the government, shall accept of any office under the United States or this state, his office of governor shall thereupon be vacant." Art. V, Sec. 8.

The constitution of Massachusetts adopted in 1780 contains the following:

"No governor, lieutenant governor, or judge of the supreme judicial court shall hold any other office or place, under the authority of this commonwealth, except such as by the constitution they are admitted to hold, saving that the judges of the said court may hold the offices of the justices of the peace through the state; nor shall they hold any other place or office, or receive any pension or salary from any other state, or government, or power, whatever.

"No person shall be capable of holding or exercising at the same time, within this state, more than one of the following offices, viz: Judge of probate, sheriff, register of probate, or register of deeds; and never more than any two offices, which are to be held by appointment of the governor, or the governor and council, or the senate, or the house of representatives, or by the election of the people of any county, military offices and the offices of justices of the peace excepted, shall be held by one person.

"No person holding the office of judge of the supreme judicial court, secretary, attorney general, solicitor general, treasurer or receiver general, judge of probate, commissary general, president, professor or instructor of Harvard College, sheriff, clerk of the house of representatives, register of probate, register of deeds, clerk of the supreme judicial court, clerk of the inferior court of common pleas, or officer of the customs, including in this description naval officers shall at the same time have a seat in the senate or house of representatives; but their being chosen or appointed to and accepting the same shall operate as a resignation of their seat in the senate or house of representatives and the place so vacated shall be filled up.

"And the same rule shall take place in case any judge of the said supreme judicial court or judge of probate shall accept a seat in council, or any councillor shall accept of either of those offices or places." Chap. VI, Art. II.

Similar provisions were adopted in New Hampshire in 1792. Art. II, Secs. 93, 94, 95.

The Vermont constitution of 1793 contains the following provision:

"No person in this state shall be capable of holding or exercising more than one of the following offices at the same time, viz.: Gov-

ernor, lieutenant governor, judge of the supreme court, treasurer of the state, member of the council, member of the general assembly, surveyor general, or sheriff. Nor shall any person, holding any office of profit or trust under the authority of congress, be eligible to any appointment in the legislature, or of holding any executive or judiciary office under this state." Chap. II, Sec. 26.

In Maryland a constitutional amendment was adopted in 1809 in part as follows:

"No governor shall be capable of holding any other office of profit during the time for which he shall be elected." Art. XI, Sec. 2.

The custom of combining incongruous offices in the same person was a prevailing abuse in the colony of Massachusetts Bay.

Quincy's Rep. p. 426, No. 10.
Com. v. Hawkes, 123 Mass., 525, 533.

II.

The governor under the laws of this state has power to remove "city or village officers chosen by the electors of any city or village" when satisfied by evidence "that such officer is incompetent to execute properly the duties of his office, or has been guilty of official misconduct, etc." I How. Stat. 653.

This statute was assumed to be valid as applied to an alderman of the city of Detroit in McLaughlin v. Burroughs, 90 Mich., 312, in which the court quotes Art. 12, Sec. 7 of the constitution as follows:

"The legislature shall provide by law for the removal of any officer elected by a county, township, or school district, in such manner and for such cause as to them shall seem just and proper." Art. 12, Sec. 7.

It has been suggested that the failure to mention cities and villages creates an application that the legislature was not to have power to provide for the removal of municipal officers, but that would be a manifest absurdity, because in that case no provision could be made for their removal.

The legislature under its general legislative power, as well as under the express power of Art. XV, Sec. 13, to provide for the incorporation and organization of cities and villages, has full authority to provide for the removal of municipal officers. This is the reason cities and villages were not named in the constitutional provisions in question.

The general legislative authority was also sufficient to authorize the legislature to provide for the removal of county, township and

school district officers; but the special constitutional provision was inserted because the constitution itself established certain county, township and school officers, and it was adviseable to avoid the inference that the legislature could not provide for the removal of these constitutional officers.

In addition to this it is certain the word "township" is a generic term which in our constitution includes villages and cities. Art. VI, Sec. 17. Art. XIII, Sec. 12.

The plenary power of the legislature under this constitutional provision authorized it to vest the power to remove municipal officers in the governor.

State v. Peterson, 50 Minn., 239.

Notwithstanding Dullam v. Wilson, 53 Mich., 292, the power of removal in this state is executive or administrative and not judicial.

Attorney-General v. Jochim, 99 Mich., 358.

That the power of one officer to fix or to participate in fixing the salary of another officer, or to remove him from office, makes the two offices incompatible at the common law is well settled.

In King v. Tizzard, 9 B. & C., 418, an alderman was appointed town clerk. The salary of the clerk was fixed by the aldermen and he was subject to removal by them. Held, that by the acceptance of the office of clerk he vacated the office of alderman.

"Lord Tenterden, C. J. I am of opinion that judgment must be given for the crown. The fifth replication shows that the common clerk has to attend corporate meetings, and to take minutes of their proceedings. If that be not done faithfully, he may be removed from his office, and upon that question he would have a vote in his character of alderman. Thus, then, he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to defendant's plea. Again, the fourth replication alleges that the common clerk has a yearly salary which may be varied in amount or altogether discontinued at the pleasure of the mayor, aldermen and bailiffs. The defendant as an alderman would have to vote upon that question, which duty I think he is not competent to perform, being also the party to receive the salary. That replication, therefore, as well as the fifth, is a valid answer to the plea."

"Bayley, J. I think that the two offices are incompatible where the holder cannot in every instance discharge the duties of each. Now, in the two questions of a motion and salary, the town clerk is

not competent to discharge the duty of alderman. The acceptance of the second office, therefore, vacates the first.

III.

The acceptance by a public officer of an incompatible office creates an immediate vacancy in the first office.

In People ex rel. Kelly v. Common Council, 77 N. Y., 503, it appeared that an alderman of the city of Brooklyn had been elected to and had accepted the office of representative in congress. The city charter provided that "No alderman shall during the term for which he is elected hold any other public office, except notary public or commissioner of deeds," and "if any alderman, elected" under its provisions, "shall be appointed or elected to and accept such public office * * * after his election or during his term of office as such alderman, his office as alderman shall immediately become vacant and his place shall be filled by a special election to be ordered within thirty days thereafter by the common council, to be held by the electors of the ward in which he shall have been elected."

On an application for a mandamus to compel the common council to order a special election to fill the vacancy in the office of alderman the court of appeals among other things said, "The defendants claimed, however, in their return, that 'the right to order a special election depends upon the title of said O'Reilly as alderman de facto to said office,' and that this question is now under consideration by them. They are charged with no such judicial duty, and in assuming it they meddle with functions that do not belong to them. Nor is there any force in the contention of their counsel that the title of O'Reilly to the office 'cannot be determined except by direct judicial proceedings to which he is a party.' The moment he accepted the new office the old became vacant. His acceptance of the one was an absolute determination of the right to the other, and left him no shadow of title, so that neither quo warranto nor amotion was necessary" (People ex rel. Whiting v. Carrique, 2 Hill, 93-97: Dillon on Mun. Cor., Sec. 164 and cases cited, note 1.) These cases also show that this would be so at common law and independent of the statute. He was no longer alderman de facto or de jure. The plea of plenarty, on which the appellants' counsel insists, or that the office was "full of him," and which is also set up in answer to this proceeding, is in no sense well founded. It cannot be sustained even by a legal fiction. The office was and is as vacant as if Mr. O'Reilly had never been born; his removal is as complete as if caused by

death. When he accepted the new office the other ceased to have an incumbent. It was not a case, therefore, for quo warranto, for that will lie only when the party proceeded against is either a de facto or de jure officer in possession of the office (King v. Corporation of the Bedford Level, 6 East., 368) and an office that is vacant is in possession of no one. Besides, such writ issues when facts are in dispute, and one object aimed at is to ascertain the facts; here no fact is disputed, but a mere question of law.

"It was therefore the duty of the defendants to order a special election. As to this the charter is imperative (section 5 supra), and furnished the only rule for their official conduct; they had no right to question it, or do otherwise than to obey. It was their duty also to make the order at such time as would enable the electors of the ward 'to fill his place' within thirty days after the vacancy occured."

In the case at bar the charter provisions as contained in chapter 4 of the Detroit charter are as follows:

"Sec. 21. In the case of expulsion or removal from office, death, resignation or permanent disability of any officer, his office shall thereby become vacant and may be so declared by the common council.

Sec. 22. Resignations of office shall be made in writing as follows: By the mayor to the common council, by the aldermen to the president of the common council, by all other elective offices to the mayor, who shall report the same to the common council for its acceptance, by all appointive officers to the mayor or other officer or board whose duty it is to fill the vacancy.

Sec. 23. If any office of appointment shall become vacant, a successor to serve for the unexpired portion of the official term may be appointed in the same manner as his predecessor.

Sec. 24. If a vacancy occurs in the office of mayor or aldermen more than six months before the time for holding the next succeeding annual city election, the common council shall order a special election to fill such vacancy for the residue of the official term, if it occurs within six months before the time for holding such election the common council may, in its discretion, order a special election to fill such vacancy for the residue of the official term.

Sec. 25. If a vacancy occurs in any elective office other than that of mayor, recorder or aldermen, the common council shall appoint some person eligible under this act, unless otherwise provided, to serve in such office until the next annual election, when the vacancy shall be filled for the residue of the official term."

These charter provisions make a clear distinction between the offices of mayor and alderman and other elective officers. In the case of mayor and aldermen the requirement is mandatory that if the vacancy occurs more than six months before the next general election a special election shall be ordered, while as to other elective officers the vacancy is to be filled until the next charter election by an appointment of the common council. For that reason, in the latter case an acceptance of a resignation by the common council is required, and in the former case an acceptance is not required as the resignation takes effect as soon as filed with the common council in the case of the mayor, or with the president of the council, in the case of an alderman.

The following cases show that the office of mayor of Detroit is now in law vacant.

Gates v. Delaware, 12 Ia., 405.
State v. Mayor, 4 Neb., 260.
People v. Porter, 6 Cal., 26.
U. S. v. Wright, 1 McLean., 509.
State v. Hauss, 43 Ind., 105.
Stubs v. Lee, 64 Me., 195.
People v. Nostrand, 46 N. Y., 375.
State v. New House, 29 La. An., 824.
State v. Bultz, 9 S. C., 156.
State v. Cousins, 77 Va., 328.
State v. Goff, 15 R. I., 508.
Reiter v. State, 51 Ohio St., 74.
Porter v. Reed, 73 Me., 129.

It is settled in Massachussets that the acceptance of the office of governor by a person holding a prior office, is in effect a resignation of the prior office.

Com. v. Hawkes, 123 Mich., 525, 533.

## IV.

An elector of the city of Detroit has a sufficient interest to enable him to apply for a mandamus to compel the common council to recognize the president of the common council as acting mayor and to order a special election to fill the vacancy.

In People ex rel. Kelly v. Common Council, 77 N. Y., 511, the court said: "Nor is the objection tenable that the relator has no standing in court. His affidavit, on which the application for the order to show cause was made, states explicitly that he is a resident and elector of the 'twelfth ward.' The return does not put this in issue by a positive denial but on information and belief only. This is not enough.

(People v. Norton, 12 Abb. Pr. Rep. (N. S.), 47, 87.) The return should be certain and of such a character as would, if false, permit a remedy by action. (Rex v. Abington, 12 Mod. Rep., 401.) Here it may be true that the respondent is informed and believes the Mr. Kelly is not a resident or elector in the twelfth ward, but it may also be true that in point of fact he is such resident and elector. There is no denial of the truth of that fact. Nor any traverse of the allegation in the affidavit. It is not denied that the relator, if his affidavit is true, has an interest in this matter nor but that the law has given him means to reach it. Nor would such a denial avail. (The State ex rel. Hanna v. The Common Council of the City of Rahway 33, N. J. (L. R.), 110: People ex rel. Fuller v. Board of Supervisors, Seneca Co., 188 How. Pr. Rep., 461; People ex rel. Case v. Collins, 19 Wend., 56-68; People ex rel. Stephens v. Halsey, 37 N. Y., 344)."

The general interest of a citizen of this state in the mere enforcement of the law is not sufficient to enable him to become the relator in a mandamus case to compel public officers to obey the law.

People v. Regents, 4 Mich., 98.
People v. Inspectors, 4 Mich., 187.
Miller v. Grandy, 13 Mich., 540.
Smith v. Saginaw, 81 Mich., 123.

But it is now universally conceded that this is not a correct exposition of the common law.

Merrill on Mandamus, section 230.
State v. Ware, 13 Oregon, 380.
Attorney General v. Boston, 123 Mass., 460.

In Union Pacific v. Hall, 91 U. S., 343, the court in an opinion by Mr. Justice Strong at p. 355, said:

"There is, we think, a decided preponderance of American authority in favor of the doctrine that private persons may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer. (Citing cases.) The principal reasons urged against the doctrine are, that the writ is prerogative in its nature, a reason which is of no force in this country, and no longer in England, and that it exposes a defendant to be harassed with many suits. An answer to the latter objection is, that granting the writ is discretionary with the court, and it may well be assumed that it will not be unnecessarily granted."

In a number of states it is provided by statute that the relator must be "beneficially interested," which is the equivalent of the Michigan doctrine. In those states, however, it is uniformly held that an elector

who would have a right to vote in the election to be ordered is sufficiently interested to entitle him to a mandamus to compel the holding of an election required by law.

State v. Brown, 38 Ohio S., 344.
State v. Tansey, 49 Ohio S., 656.
Eby v. School Trustees, 87 Cal., 166, 173–176.
State v. Weld, 39 Minn., 426.

Statutes of these states:

2 Rev. Stat. of Ohio (1886), section 6744.
3 Deering's Codes and Stat. of Cal. (1886), section 1086.
2 Stat. of Minn. (1894), section 5976

In Sanson v. Mercer, 68 Tex., 488, 493, the court refused to follow Turner v. Commissioners 10 Kan., 11, on the very distinction we rely upon.

Electors of the City of Detroit have an entirely different interest in having an election held to fill the vacancy in the office of mayor than the electors or inhabitants of the state at large, and this fact alone is sufficient to distinguish the case at bar from the Michigan cases relied upon by counsel for respondent.

The right of the relator is a personal political right to protect which he can invoke the proper remedy in the courts.

Except in the exercise of their supervisory jurisdiction over inferior courts, the circuit courts under the constitution of 1850 had no power to issue writs of mandamus.

McBride v. Common Council, 32 Mich., 360.

In 1893 a constitutional amendment was adopted giving them such jurisdiction in mandamus cases "as the supreme court shall by rule prescribe."

Public Acts, 1893, p. 452.

Under this amendment the supreme court has by rule authorized the circuit courts to issue writs of mandamus, but without requiring the relator in any such case to be an interested party, leaving that matter to be governed by common law rules as now expounded everywhere.

Hence, the cases in the 4th of Michigan and the subsequent cases in the same direction are not applicable.

FRED. A. BAKER,
*Attorney for Relator.*

# GOVERNOR AND MAYOR.

*Attorney-General vs. The Common Council of the City of Detroit.* *
*Opinion of the Supreme Court.*

The people ex rel Fred A. Maynard, attorney-general, vs. the common council of the city of Detroit.

Hon. Hazen S. Pingree was elected mayor of the city of Detroit, and while an incumbent of that office was elected to and entered upon the execution of the duties of governor. He continues to perform the functions of both, and the petition in this proceeding proceeds upon the theory that by accepting the latter office, that of mayor has become vacant, and a writ of mandamus is asked commanding the respondent to call an election to fill such vacancy.

Two theories are presented under which it is contended that Mr. Pingree cannot hold these two offices at one and the same time.

1. That he is prohibited by section 15 of article v. of the constitution, which says, "No member of congress, nor any person holding office under the United States or this state, shall execute the office of governor."

2. That the two offices are incompatible under the rules of the common law.

Many cases have arisen upon similar provisions of the various constitutions, and while the decisions are not altogether uniform, we shall find them in substantial harmony upon two propositions, viz.: first, that an officer of a city, whose duties are simply and purely municipal, and who has no function pertaining to state affairs, does not come within the constitutional description of officers holding office under the state, and, second, where officers in cities are appointed or elected by the community in obedience to laws of the state which impose duties upon them in relation to state affairs, as

* This opinion has been thought too long for publication in its entirety and the discussion of two points has been omitted. These are discussed in the briefs printed in this number. The point concerning the discussion in the constitutional convention of 1850, is omitted from the briefs but included in the opinion.

contradistinguished from affairs of interest to the city, merely, such as relate to gas works, sewers, water works, public lighting, etc., they are upon a different footing, and may properly be said to hold office under the state. We will first consider whether this distinction is a proper one to be made under our constitution, and it must be determined upon adjudicated cases elsewhere, and such lights of a domestic nature as our own decisions and discussions afford.

In the state of Louisiana all decisions rest upon the decision in the case of Dorsey vs. Vaughan, 5 La. Ann. 155. In that case, the question before the court was, whether a person could be, at the same time, sheriff and parish tax collector. The court said that, "the office of parish tax collector, if office it be, is a municipal office; that of sheriff is a state office. The incompatibility contemplated by the constitution is the holding of two state offices.

See also, state vs. Blanchard, 5 La. Ann. 515, which deals with another constitutional provision, and Voorheis vs. Fournet, 15 La. Ann. 597, state vs. Montgomery, 25 La. Ann. 140; state vs. Newhouse, 29 La. Ann. 834; state vs. Somnier, 33 La. Ann. 238.

From the foregoing it would appear that the Louisiana authorities sustain the proposition contended for, viz.: that only state offices as contradistinguished from those pertaining to counties, etc., are within the provision of the Louisiana constitution, and not only that, but they must be offices created by the constitution. Offices of lesser subdivisions seem to be treated as municipal offices, and as the parish in Louisiana is defined by Webster to be "a civil division, corresponding to a county, in other states," it is obvious that Dorsey vs. Vaughan was not in fact treating of a municipal corporation proper, but a quasi municipal corporation, and this may perhaps be explained by the fact that the civil law is the substratum of Louisiana jurisprudence. This use of the term municipal corporation does not seem to be adopted in the other cases that we shall discuss, and we mention it to clearly show that the Louisiana cases differ in important particulars from others. We recall no other case that goes so far as to hold that county and township offices so called, are not "offices held under the state.

Counsel for the respondents are of the opinion that the Louisiana cases are reinforced, and that view is shown to have been entertained by our constitutional convention of 1850, not by reason of its treatment of this particular provision, but in its discussion of a kindred provision appertaining to the eligibility of members of the legislature, viz., Section 6 of Article IV.

INTERPRETATION OF THE CONSTITUTION.

The counsel have, we think, misapprehended the purport of the discussion in the constitutional convention. So far from the members of the convention entertaining the opinion that the expression, "officer under the state," means the same thing as state officer, the contrary view appears to have been expressed by every member who is recorded as having addressed the convention upon the subject. Mr. Bush, referring to the provision of the constitution of 1835, which reads, "No person holding any office under the United States, or of this state, officers of the militia, justices of the peace, associate judges of the Circuit and County Courts, and postmasters excepted, shall be eligible to either house of the legislature," said, "Under it the question of the eligibility of certain county officers had been frequently before the legislature, and it was yet uncertain whether they rightfully held their seats or not. It was urged by some that the county and township officers were excluded from holding seats, from the very fact that justices of the peace were excepted. He had never been in the legislature without witnessing some confusion, growing out of the election of a county officer, judge, clerk, or some other." Mr. Bush further stated that it was the duty of the convention to set the matter at rest.

Mr. McClelland thought, "The general interpretation of the clause of the constitution was as stated by the member from Ingham (Mr. Bush)—that all officers were excluded save those specially excepted. * * * In regard to the cases of county officers holding seats, mentioned by gentlemen, he believed the question of their eligibility had been referred to committees, but, if rumor was correct, those committees had withheld their reports, and the officers thus permitted to remain and hold their seats in the legislature. The question was not settled."

After an amendment inserting the words, "or any county office," had been proposed, Mr. Goodwin said, "It has been remarked that the corresponding section in the present constitution has occasioned a great deal of discussion in the legislature. It has received a broad construction, and one, I think, not in conformity with its object and intent," and, after quoting the provision, he proceeded: "One would have supposed that the phraseology would have excluded county officers, yet it is well-known that they have been admitted to seats.

In California, the constitutional provision was that "No person

holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state," etc. In People vs. Leonard, 73 Cal. 230, the office of supervisor of a district was held to be prohibited.

In the absence of authority we should hesitate before saying that the constitutional convention contemplated that a governor might be a sheriff, or county clerk, or a supervisor or highway commissioner, upon the ground that counties and townships are recognized agencies of government, each forming a territorial division to and upon which is given the privilege and imposed the responsibility of managing certain public affairs of the state in the respective localities.

Still it is urged that the constitution makers had no intention of excluding occupants of municipal offices from executing the office of governor while at the same time they prohibit incumbents of the office of overseer of highways, school inspector, or even notary public, from performing the duties of governor.

It would seem manifest that, if the contention of counsel for the respondents is correct, it must be based upon some other reason than a lack of interest on the part of the state, in the performance of their duties by city officers.

### Cases where Distinctions have been made.

We do not recall a reason that has been given, that will serve to explain satisfactorily, why the mayor of a city should be permitted to execute the office of governor, when the incumbent of the lowest office in a township, or a postoffice at cross roads is prohibited. But, plain as this may seem to be, there are cases which make a distinction between state and municipal offices, and we will discuss them.

In Pennsylvania, the constitution provided that no person, holding office under the United States, should exercise the office of judge. The recorder of Philadelphia has some judicial functions, and, in Respur vs. Dallas, 3 Yeates 314, it was said that, in strict legal sense, he was a judge, but that there was difficulty in determining what the constitution meant, and the court seems to have considered it a close question, but determined that the use of the word "judge" was with reference to officers known by that name in the law, and that it was not intended to include all who performed judicial duties. Among other reasons for reaching this conclusion (and it is a cogent one), was the fact that, in the section under dis-

cussion, "not only some of the judicial characters, as justices of the peace, are omitted in the prohibition, but others, as registers of wills, although as constituting a part of the register's court, they are declared to be part of the judicial power of the state, are particularly included in the prohibition, showing the sense of the convention, that every person exercising judicial power was not intended to be included under the word "judge;" otherwise it would have been nugatory to have expressly included the registers."

It is plain that the decision does not aid us in determining whether city offices are held under the state, yet it is one of the cases relied on in support of respondents' contention. It is a case where a city office was held not to be included, but it was for reasons peculiar to the particular provisions of that constitution. In State vs. Wilmington City Council, 3 Har. (Del.) 300, the court passed on the following provision of the constitution, viz:

"No ordained clergyman, or ordained preacher of the gospel of any denomination shall be capable of holding any civil office in this state, or of being a member of either branch of the legislature."

The question arose over the office of city treasurer, and it was held not to be within the meaning by the provision.

Here, again, some facts are found in connection with the Delaware constitution which render the decision of no great force upon the question we are discussing. One thing the opinion does show, viz.: that local officers, such as constables, overseers of the poor, and even attorneys-at-law were state officers. We quote:

"Is this principle fully recognized in excluding clergymen from all offices connected with the government properly speaking, or does it require to be extended to offices held under public corporations, and not held under or composing any part of the state government? The business of the convention was to establish a state government and to provide the mode of its administration. In speaking of offices such offices were undoubtedly meant as were designed for this purpose, either directly or indirectly. And the constitution is very particular in its details in reference to officers and the mode of their appointment, specifying election officers, officers relating to taxes, to the poor and to highways, constables and hundred officers. Even attorneys-at-law seem to have been regarded as officers, being a part of the judicial branch of the government, and concerned in carrying out the system. For all these have their parts to perform; and without the agency of any, the most unimportant of them, the system would be imperfect. But the constitution nowhere descends to notice

a corporation officer. Such an office forms no part of the system of government, it is perfectly immaterial for all the purposes of state government, whether the city of Wilmington has a treasurer; and, as the existence of such an officer did not enter into the system of government which the convention was forming, it cannot be supposed that the qualifications or disqualifications which they sought to apply to their officers, were designed by them to be extended and applied to such corporate officers."

Other reasons arising out of and peculiar to the Delaware constitution, are shown in the following quotation from the opinion:

"But if this office of city treasurer be an office within the meaning of the constitution, the whole affair is wrong, and the people of Wilmington have no right to choose the person who shall fill that office. If this be a "civil office in this state," such an office as is embraced within the constitution, it is an office "under this state," and the appointment to it is, by the same constitution, vested in the government. "Art. 3, Sec. 8. The governor shall appoint all officers whose offices are established by law, and whose appointments are not herein otherwise provided for." This is an office established by law, and the appointment to it is not provided for in the constitution, otherwise than by the general appointing power of the governor; if, therefore, it be a constitutional office, it must be filled by the governor's appointment.

This case clearly implies, if it does not expressly state, that the city treasurer of Wilmington has no functions of a state character, in the language quoted, which we repeat:

"For all these have their parts to perform, and without the agency of any, the most unimportant of them, the system would be imperfect. But the constitution nowhere descends to notice a corporation officer. Such an office forms no part of the system of government; it is perfectly immaterial for all the purposes of state government whether the city of Wilmington has a treasurer or no treasurer."

We may conclude what we have to say upon that case with the statement that the opinion refers to the case of Respur vs. Dallas, 3 Yeates, as "in point, and on the same principle," upon the question of constitutional construction; i. e., that the section is to be construed in the light of other provisions of the constitution.

It will be noticed that in neither of these cases is there anything that militates against the proposition, that a municipal officer with state functions, is an officer under the state, or asserts that he is

exempt from the provisions, because elected by a city or village.

WHERE THE LINE IS DRAWN.

But in the case of Attorney-General vs. Connors, 9 South, Rep. 7, may be found an instance where the supreme court of Florida holds that, while a sheriff is within the prohibition of one of these provisions because he is a state officer, a city marshal is not, because he holds under a city, and therefore not under the state. It seems to be put upon the ground that, inasmuch as the constitution left the legislature the power of creating and destroying municipal corporations, it cannot be supposed that they were understood to be a part of the state government, considered in its broad and comprehensive sense, although it admits that they are clothed with powers to be exercised outside of the confines of the municipality (and, therefore, of state powers), still "they are incidents, auxiliaries, and agencies only, in their relation to the state government." Again, county officers are distinguished upon the ground that they "are, in express terms, created and provided for by the constitution, as part of the machinery of the state's government, in their respective counties, and are to be regarded, strictly speaking, as officers of the state."

This case decides the question upon its own state constitution, and were we to approve the reasoning, might readily be distinguished from a case arising under our constitution.

We are not impressed by the argument that, as these corporations and offices may be created and destroyed by the legislature, such offices are not held under the state. County and township, and for that matter state offices, may be created and destroyed by the legislature at will, yet they are state offices.

In Santo vs. State, 2 Ia. 220, where the question was whether a mayor, who was given the criminal jurisdiction of a justice of the peace, had functions pertaining to two departments of the government, viz., the executive and judicial, the court disposed of the question by the simple assertion: "These departments are the departments of the state of Iowa. The mayor of the the city of Keokuk is not a part of the government of the state of Iowa. He exercises none of the functions belonging to that department. Whatever executive offices he may perform, pertain to him only as an officer of that corporation. But we do not mean to say that he is an executive officer, in any proper sense."

It yet remains to determine whether mayor of Detroit has state

functions, and when the provisions of law upon that question shall have been collected, it will leave no room for doubt.

By the charter, local acts, 1883, page 594, sec. 1, the mayor is made a conservator of the peace, which imposes a state duty. Howell, Sec. 9264, imposes similar duties. It is as follows:

"If any persons, to the number of twelve or more, being armed with clubs, or other dangerous weapons, or if any persons, to the number of thirty or more, whether armed or not, shall be unlawfully, riotously, or tumultuously, assembled in any city, township or village, it shall be the duty of the mayor and each of the aldermen of such city, the supervisor of such township, the president and each of the trustees or members of the common council of such village, and of every justice of the peace, living in such city, township or village, and also of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as may be with safety, and in the name of the people of this state to command all the persons so assembled immediately and peaceably to disperse."

This is made more emphatic by a provision making neglect or refusal to perform such duty punishable under the criminal laws of the state.

"If any mayor, alderman, supervisor, president, trustee or member of a common council, justice of the peace, sheriff or deputy sheriff, having notice of any such riotous or tumultuous and unlawful assembly as is mentioned in this chapter, in the city, township or village in which he lives, shall neglect or refuse immediately to proceed to the place of such assembly, or as near thereto as he can with safety, or shall omit or neglect to exercise the authority with which he is invested by this chapter, for suppressing such riotous or unlawful assembly, and for arresting and securing the offenders, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding three hundred dollars."

Again, Sec. 9435 authorizes the mayors of all cities to require persons to keep the peace, and Sec. 9454 authorizes them to conduct examinations of persons charged with crime, and commit them to jail, or require a recognizance for appearance, at the Circuit Court for trial. Again, Sec. 9479 authorizes mayors to admit persons charged with crime, to bail.

Section 9385 commands mayors to issue proclamations requiring saloons to be closed upon election days, and again emphasizes the state character of this requirement, by making a violation of the section a misdemeanor, punishable by fine and imprisonment.

Again, under Howell, Sec. 911, in cases of riot, breach of the peace, tumults, or violent resistance of any process of this state, it is within the power of the mayor to call upon the commanding officer for aid from state troops, and Sec. 914 provides a punishment for officers who refuse to comply with the request.

Again, mayors are members of the boards of health, Section 1681. Again, the mayor may administer oaths. Laws of 1893, page 597, Sec. 14, and under Sec. 15 may hear complaints and annul or suspend licenses for violations of the charter, or any other law of the state.

Other duties might be mentioned, but these are perhaps the most significant, and are ample to show that the mayor of Detroit holds office under this state, and we think it beyond reasonable contention that this office is within Article V., Section 15, prohibiting the execution of the office of governor, by one holding it.

### Are the Offices Incompatible?

Are the offices of mayor of the city of Detroit and the governor of the state incompatible under common rules?

It is the universal rule that when such incompatibility exists the acceptance of the latter office vacates the first. State vs. Goff, 15 R. I. 505; 2 Am. St. Rep. 925, and authorities there cited.

The authorities are in substantial agreement as to the rule of incompatibility and Mechem states it as follows: "This incompatibility which shall operate to vacate the first office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."

Mechem Pub. Officers, sec. 429. In State vs. Goff, the test is thus stated: "The test of incompatibility is the character and relation of the offices; as where one is subordinate to the other, and subject in some degree to its revisory power, or where the functions of the two offices are inherently inconsistent and repugnant. In such cases it has uniformly been held that the same person cannot hold both offices."

In State vs. Thompson, 20 N. J., 689, it is said: "Where there is no express provision, the true test is whether the two offices are incompatible in their natures, rights, duties or obligations connected with or flowing out of them. Offices, says Bacon, are incompatible or inconsistent when they cannot be executed by the same person; or when they cannot be executed with care and ability; or where one is subordinate to or interferes with another (Bac. Abr. Tit. "Office"

K); or where one office is under the control of another (Com. Dig. Tit. "Office"). A town clerk, made mayor, and accepting the office, ceases to be town clerk, as the one office is subordinate to the other; and where a coroner is made sheriff he ceases to be coroner (Bac. Abr.). So, where a master in chancery is appointed chancellor, I apprehend he ceases to be master, because the chancellor has a control over his masters."

ACCEPTING LATER OFFICE VACATES THE FIRST.

The sole difficulty lies in the application of the rule, and in every case the question must be determined from an ascertainment of the duties imposed by law upon the two officers. If one has supervision over the other, or if one has the removal of the other, the incongruity of one person holding both offices is apparent, and the incompatibility must be held to exist so that the acceptance of the latter vacates the former. We have already referred to the provisions of the charter and the statute laws imposing duties upon the mayor. For the violation of some, if not all these, he might be removed from office by the governor under the statute hereinafter cited.

Section 653, Howell's Statutes, confers upon the governor the power to remove "all county officers chosen by the electors of any county or appointed by him, and shall also remove all justices of the peace and township officers chosen by the electors of any township, or city or village officers chosen by the electors of any city or village," etc.

The constitution, Art. XV., section 13, provides for the incorporation and organization of cities and villages by the legislature. Under this provision the legislature possesses the power to provide for the creation, election and removal of the municipal officers of cities and villages. Such has been the universal practice under the constitution.

The constitution, Art. XII., section 7, is as follows: "The legislature shall provide by law for the removal of any officer elected by a county, township or school district in such manner and for such cause as to them shall seem just and proper."

It is urged that this provision of the constitution last quoted does not in express terms include the mayor, and that therefore no such power of removal exists.

In McLaughlin vs. Burroughs, 90 Mich. 311, proceedings were instituted for the removal of an alderman of the city of Detroit under the statute above cited. The proceedings were recognized as

authorized under the latter provision of the constitution above cited. The authority to institute the proceedings does not appear to have been questioned.

This argument carried to its logical conclusion would result in holding that the legislature has no power to provide for the removal of any village or city officer, because if there is no constitutional power to provide for the removal of a mayor there is also no constitutional power to provide for the removal of any officer of a city.

Chief Justice McGrath, in his opinion in Davock vs. Moore, 63 N. W. Rep., said: "There is no doubt of the power to provide for the removal by the governor of any officer of any municipality in the discharge of whose functions the state has a special interest." The majority opinion was not in conflict with this statement.

Counsel for the respondent appear to concede that the charter provisions for the removal of officers are valid. This concession concedes the power to provide for the removal of the mayor, and for authority for his removal we must look to the general statute of removals. This statute expressly includes the mayor, and is clearly authorized by the constitution, whether it be based upon sec. 7, article XII., or upon sec. 13, article XV., which confers upon the legislature exclusive authority over the organization of cities and villages.

It is also urged that this general law is superseded by the charter of the city because the latter provides for the removal of other city officers, but not of the mayor. In other words, the mere silence of the charter operates as a repeal as to the office not mentioned as well as to those mentioned in it. If the charter had made provision for the removal of the mayor there would be force in this contention that the latter superseded the former, but mere silence as to the removal of an officer does not operate to suspend or repeal a general law, providing for such removal.

In King vs. Tizzard, 9 B. & C., 418, it was held that the offices of alderman and town clerk were incompatible, and that one person could not hold both, and this for the reason that the mayor, aldermen and bailiffs of the borough had the appointment of the clerk, the fixing of his salary, and the power of removal. This decision was largely based upon the power of removal. Lord Tenterden, C. J., said: "The fifth replication shows that the common clerk has to attend corporate meetings and take minutes of their proceedings. If that be not done faithfully, he may be removed from his office, and upon that question he would have a vote in his character of alder-

man. Thus, then, he would fill the two incompatible situations of master and servant."

In the same case, Bayley, J., said that he thought two offices were incompatible where the holder cannot, in every instance, discharge the duties of each; and in the two questions of amotion and salary the town clerk was not competent to discharge the duties of an alderman.

In State vs. Thompson, supra, held, that the offices of attorney-general and prosecutor of the pleas were incompatible, although neither the constitution nor the statute prohibited it.

In Cotton vs. Phillips, 56 N. H., 220, the offices of prudential committee and auditor of school district were held incompatible, because it was the duty of the auditor to examine the accounts of the prudential committee and report whether they were properly cast and supported, and whether the money had been legally expended. The court said: "If the same person could hold both offices he would in fact sit in judgment on his own acts."

In Stubbs vs. Lee, 64 Me., 195, it was held that the defendant vacated the office of justice of the peace by being appointed to and assuming the functions of deputy sheriff on account of the incompatibility of the two.

### Even affects Military Offices.

In State vs. Brown, 5 R. I. 1, the defendant, a colonel of a regiment of the militia, was appointed to the office of major-general, and it was held that his acceptance of that office vacated his colonelcy. The language there used is also applicable to this case: "Now, looking at the duties of the two offices in question, the legal compatibility of the two is hardly an arguable position. For the same person to be commander and commanded—to be superior and subordinate at the same time—above his brigadier in one capacity and below him in another, contradicts every notion of military authority and discipline, unless, as the argument for the defendant supposes, when acting in his higher capacity he abandons his lower capacity, or vice versa."

In State vs. Buttz, 9 S. C. 156, the question was whether the offices of state solicitor and member of congress were incompatible; held, that they were, notwithstanding the provision of the constitution "that every person entitled to vote at any election shall be eligible to any office which now is or hereafter shall be elective by the people," etc.

See also Pooler vs. Reed, 73 Me. 129.

If a superior officer is clothed with the power to remove from office an inferior officer, there is certainly no logic or reason in holding that one person may hold both. No more marked imcompatibility is possible.

The remoteness of the necessity for the removal of a mayor by the governor is urged by counsel for the respondents as a reason why a legal incompatibility does not exist at the common law. The question, however, is one of the existence of the power, and not the remoteness of its exercise. This position is well answered in State vs. Goff, where it was urged that the respondent would not probably undertake to act in both offices at the same time—"The admitted necessity of such a course is the strongest proof of the incompatibility of the two offices; the question of incompatibility is to be determined from the nature of the duties of the two offices, and not from a possibility or even a probability that the defendant might duly perform the duties of both." State vs. Brown, 5 R. I. 1.

The power of removal is ever present, ready for use when its exercise is required. The argument that the contingency for its use is very remote is without force.

We have been unable to find a decision which holds that one person may hold two offices, in one of which he is clothed with power to remove the person holding the other. It follows that the offices of mayor and governor are incompatible.

Reference has been made, on behalf of respondent, to the alleged fact that Mr. Pingree was elected to the office of governor after a declaration of an intention to continue to perform the duties of the office of mayor, and a result which ousts him from the office of mayor will have the effect to disfranchise the people, and that such a result is fraught with dangerous consequences.

Were it not for the eminence of counsel who present these considerations to this court, we should hesitate about adverting to such elementary principles as furnish an answer to these suggestions and demonstrate their impropriety as well. Even the power of majorities may be, and often is, restrained by the written constitution, and where the majority assumes to do what is permitted in a mode forbidden by the constitution, the duty of the court to protect the rights of minority is too manifest to require, at this day, either apology for its exercise or an elucidation of its source of authority. If, in law, the effect of the election of Mr. Pingree to, and his acceptance of, the office of governor operated to vacate the office of mayor, a

court that would weigh majorities before so declaring would deserve impeachment and the community which would follow.

We have yet to consider the effect of the attempt to execute both offices. Mr. Pingree has taken the constitutional oath, and is in possession of the office of governor, and performing its duties. This section of the constitution renders the two offices incompatible, as does the rule of the common law already discussed, and the general rule that the acceptance of a second vacates the first of two offices that are incompatible is not only the rule of the common law, but is held to apply to incompatibility growing out of constitutional provisions in several of the cases hereinbefore cited. See People vs. Sanderson, 30 Cal., 167; People vs. Provines, 34 Cal.; Foltz vs. Kerlin, 105 Ind., 222; Dailey vs. State, 8 Blackf., 329; Shell vs. Cousins, 77 Va., 328; also Northway vs. Sheridan, 69 N. W. Rep., 82.

From what is said it is obvious that the respondent should not have refused to call an election, and in view of the fact that an election is to be held in Detroit on the 5th day of April next, it is desirable, upon the ground of economy, that this vacancy be filled at that time, if it can be legally done. Counsel seem to agree that seven days' notice of the special election to fill this vacancy is sufficient, and there is ample time to nominate candidates at conventions which have been already or can yet be called. It is conceded by counsel for the respondent that primaries for a special election may be held after the time specified in Act 411, Laws of 1895, if there be time to print the ballots.

We are, therefore, of the opinion that the election can be lawfully held at that time.

The writ will be granted as prayed, requiring the respondent to take all necessary steps to hold such election at the time named.

The other justices concurred.

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ROBERT E. GRAHAM.

## *NOTES.*

In this number of the MICHIGAN LAW JOURNAL is included quite a full record of the case which declared that Governor Pingree of Michigan is not also Mayor Pingree of Detroit. The brief of Mr. Joslyn in the first started case of Moreland vs. Common Council is printed in full as showing the points raised and discussed in the later case of Attorney-General vs. Common Council. The brief filed in the former case was extended to the latter, and another brief further discussing the question of the incompatibility of the offices of Governor and Mayor was filed. This brief also made a point of the fact that in the constitutionl convention of 1850, a discussion arose as to whether the expression of "officer under this state" was intended to mean only state officers or was used in an extended sense. The discussion arose on the clause reciting the qualifications of members of the legislature, and the section fixing them was finally adopted to read as follows: "No person holding any office under the United States or this state or any county office * * * shall be eligible to" etc. Later in the constitutional convention the clause fixing the qualifications of the governor was passed without discussion and recites: (Art. 5, sec. 15 const.) "No member of congress nor any person holding office under the United States or this state shall execute the office of governor." This point answered in the opinion of the court was a part of that matter omitted by the editors in printing the brief of Mr. Joslyn filed in the later case.

The point decided in the case has ceased to be open for discussion; it is now the "*law.*" But were it a matter on which opinions would or could affect the outcome of litigation, this magazine would urge one thing. Without this decision it is clear that the law is not all on one side. Decisions go for and against, and in this state the people have spoken with a loud voice and said: "We do not want the law to be so construed that the governor cannot be at the same time mayor." Not necessarily are the people always right, but in a government by majorities if they are not clearly wrong, they ought to be given the benefit of the doubt and be found by the court when tried for the crime of ignorance, "not guilty."

## *LEGAL MISCELLANY.*

The novel question as to the right of counsel to shed tears before a jury recently came before the supreme court of Tennessee, in the case of Ferguson v. Moon. It was assigned as error in that case that counsel for plaintiff in his closing argument, in the midst of a very eloquent and impassioned appeal to the jury, "shed tears, and thus unduly excited the passions and sympathies of the jury in favor of the plaintiff and greatly prejudiced them against defendant." The supreme court admits its inability, after diligent search, to find any direct authority upon the point, the conduct of counsel in presenting their cases to juries being as a rule a matter which must be necessarily left largely to the ethics of the profession and the discretion of the trial judge. The court says, however, that "no cast iron rule should be laid down. To do so would result that in many cases clients would be deprived of the privilege of being heard at all by counsel. Tears have always been considered legitimate arguments before the jury, and we know of no power or jurisdiction in the trial judge to check them. It would appear to be one of the natural rights of counsel which no statute or constitution could take away. It is certainly a matter of the highest personal privilege. Indeed, if counsel have tears at command it may be seriously questioned whether it is not his professional duty to shed them whenever proper occasion arises, and the trial judge would not feel constrained to interfere unless they are indulged in to such excess as to impede, embarrass or delay the business before the court. In this case the trial judge was not asked to check the tears, and it was, we think, a very proper occasion for their use, and we cannot reverse for this reason."—*Central Law Journal.*

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A case of far-reaching importance has just been decided by the United States supreme court was: Is a judgment of a state court, which takes and appropriates to the use of the public, land owned in fee simple by a railway company, for compensation that is merely nominal, reserving to the company the right to cross the street when opened for general use, a violation of the constitutional provision against taking property without due process of law? The railway

company set up the claim that they were entitled to the same rate of compensation for the land appropriated which the city allowed to individual owners of contiguous property. In one of the cases tried the city paid the individual property owners whose lands were condemned, about $8,350—the full market value—in damages, while for the strip of land belonging to the railway company, embracing 10,798 square feet, it paid only $1. This discrimination was made under a city ordinance providing that the municipality may at any time open a street through a railroad company's right of way by paying $1 nominal damages to acquire title. The main question which the supreme court was called upon to decide was as to the constitutionality of this ordinance, and the correctness of the ruling by the state court upholding it as sound law. The federal court answers in the affirmative. While conceding that the railroad company holds its lands in fee simple, just as any private owner does, it is regarded as inequitable and against public policy to permit a railway corporation, which originally acquired its right to its land and franchise from the public, to assume an obstructive attitude and prevent needed public improvements. The right of the railroad to cross the new street with its tracks not being impaired in any way, it is bound to part with its title and give way to the interests of the public. This is, we believe, a new and radical departure, somewhat startling at first glance; and while the subject is not entirely free from difficulty, the principle thus clearly enunciated by the highest court in the land is sound and reasonable. It will be heard with gratification by the people of many states, particularly those residing in the large cities, where the work of extending streets can now go on without fear of being compelled to pay heavy damages for the privelege of crossing the right of way of railroad companies. Justice Brewer dissents from the opinion of the court and holds substantially with the attorneys of the railroads, denying the right of a city to discriminate against them in the matter of compensation for property taken for public purposes. More elaborate reference to and comment upon the decision must be deferred until its full text is at hand.—*Albany Law Journal.*

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The Imperial Vexatious Actions Act, 1896 (59 & 60 Vict. c. 51), was not passed before it was necessary. A similar act in Ontario would be a move in the right direction. We are ripe for the passage of such a measure. Every Assize list contains cases that should never have been brought; actions are begun in the hope of obtaining settlement money; writs are frequently issued and published in the sensational portion of the daily papers, with a view to coercing parties into the payment of money to secure a discharge from foundationless claims, or from trifling and frivolous actions. Probably the first case to come before the courts under the English act was that of *In Re Chaffers, Ex parte The Attorney-General*, reported at page 44 of

this number of *The Barrister*. In this case it was proved by affidavits that the respondent, who was sought to be enjoined from bringing any further actions, had, between January, 1891, and December, 1896, instituted 48 actions against the Lord Chancellor and other Judges, the Speaker and officials of the House of Commons, the Solicitor for the Treasury, and the Trustees of the British Museum. The actions were mainly brought for slander, conspiracy to defeat justice, assault, refusal to receive a petition in the House of Commons, and wrongful exclusion from the reading room of the British Museum. The respondent had failed in 47 actions, and no costs had been obtained from him. In one action he succeeded on a claim for £1, for work done in copying an affidavit for the use of the Solicitor to the Treasury. It is scarcely necessary to say that an order was granted, prohibiting the respondent from instituting any legal proceeding either in the High Court or any other Court without leave of the High Court or a Judge thereof in accordance with the act.

The supreme court of Iowa has recently rendered a very democratic judgment in the case of *Nix* v. *Goodhill*, 93 Iowa, which, in the result, works out a relief in damages on somewhat parallel lines to the prohibition awarded in the English act. The court, in this case, holds that an action will lie against one who maliciously and without probable cause garnishees the exempt earnings of his debtor, knowing them to be exempt, with the purpose of harassing the latter's employers, and thereby compelling them to pay the debt out of such exempt money in order to avoid discharge. Addison on Torts says that "whoever makes use of the process of the court, not warranted by the exigency of the writ or the order of the court, is answerable to an action for damages for an abuse of the court process."

The judgment of the Iowa court is based upon the following extract therefrom, which certainly commends itself to civilization and common sense:

"The authorities all agree that the unlawful use of the process must be malicious, and without probable cause, as in actions for malicious prosecution. In truth, an abuse of a legal process partakes of the character of a malicious prosecution, the only possible distinction being that one is the malicious prosecution of a suit, and the other the malicious use of a process issued in aid of a proceeding, either pending or determined. And it may be well questioned whether such a distinction actually obtains. As a rule, a proceeding, such as was had in this case, is instituted for the purpose of enabling the plaintiff to utilize the process of the court maliciously, and hence the malice in fact attaches to the very institution of the suit, giving it the obnoxious characteristics of a malicious prosecution."

Where property is exempt from execution, a levy upon it is unwarranted. An execution against a judgment debtor requires the officer serving the same to satisfy the judgment and interest out of the property of the debtor subject to execution, and seeking to satisfy

the judgment out of property not subject to execution is an unwarrantable act, which, if done maliciously and without probable cause, constitutes a malicious abuse of a legal process. Where a party directs a garnishment knowing of the exemption, with the intent to unlawfully subject such exemption to the satisfaction of his claim, by annoying and harassing the employer so that he will discharge the debtor unless he pays the debt out of his exempt earnings, there is plainly an unlawful use of the process, and just as plainly a flagrant abuse of it. It is no excuse that the execution, to which the garnishment was auxiliary, was valid, and that what was done "was in excess of that which was warranted."—*The Barrister.*

## BOOK REVIEWS.

EXTRAORDINARY CASES. By HENRY LAUREN CLINTON, New York, Harper & Brothers. 403 pp. For sale by J. L. Hudson Company, Detroit.

This book is a well written, interesting account of personal experiences of the author during an extended practice as a lawyer in New York City. The language is carefully chosen and conveys an idea as distinctly as does the glazier's diamond to the glass it cuts. This much can be said in praise of the work. And more, too, for some of the accounts are very interesting. Take the case of Henri Carnal, which begins on page 96 of the book and continues through forty pages. It is positively thrilling to follow the defense of this man accused of a terrible murder. Mr. Clinton under protest was assigned to defend the man. The accused was tried immediately, notwithstanding his lawyer's request for delay. He was condemned and by the judge sentenced to death. A technical objection to the proceedings on the trial was urged by the lawyer and overruled by the judge. The delay in overruling the exceptions noted on the trial was so great, that but for the fact that the governor twice granted a respite, the sentence of death would have been inflicted. The bill of exceptions was finally withdrawn from the trial judge, who seemed unwilling to sign a bill, alleging errors which he must have recognized as fatal. It was presented to the higher court of which the trial judge was a member. It was overruled. The case was taken higher and a judge of the supreme court from another circuit than the one in which the crime had occurred finally granted a writ of error with a stay of proceedings. This was the night previous to the day set for Carnal's execution, and the governor had absented himself from the city that he need not pass on an application for another respite for the prisoner. The writ of error was eventually decided in the prisoner's favor, and a new trial was granted by the supreme court. The district attorney applied for a writ of error to the court of appeals, but that court on motion of Mr. Clinton dismissed the writ on the ground that the prosecution had no appeal from a judgment in the supreme court in favor of a prisoner, granting a new trial. A bill was introduced and passed by

the legislature granting a right of appeal on the part of the prosecution under the circumstances of the Carnal case. An appeal was taken, but by making a clever argument, showing that, although the law was intended to apply to the Carnal case interpreted, by the rules usually employed the language could not reach this case, and so again the district attorney was defeated.

There are other incidents related in a way just as entertaining, but a criticism passed by Mr. Clinton upon the opposing lawyer in the Carnal case can well be applied to himself. He calls his brother lawyer vain and conceited, and perhaps he was right. A good sketch of Mr. Clinton, the author of the book, can be obtained from a careful perusal of its pages. He is seen to be an able man, for no one lacking in ability could write so well; but clearer than all else is seen his vanity, his egotism. The best garland for the crown of a truly great man is modesty, and in the case of Mr. Clinton it is absent.

## RECENT MICHIGAN DECISIONS.

ADVERSE POSSESSION—TITLE OF DONEE—RIGHT OF MORTGAGEE.—Possession of land by a donee under a mere parol gift, accompanied with a claim of right, is an adverse holding as against the donor, which, if continued without interruption, is protected by the statute of limitations, and matures into a good title.

A mortgagee can not assert a right against one in possession of land holding adversely, that could not be asserted by the mortgagor, if the mortgage had not been made.—*Schafer vs. Hauser, et al.* (February 18, 1897.)

CONTRACT OF EMPLOYMENT—BREACH OF CONTRACT—EVIDENCE—BURDEN OF PROOF.—Plaintiff was employed by defendant as a traveling salesman upon a yearly contract. In September he was discharged by defendant on the ground that he had refused or neglected to carry out the instructions of the defendant. This action was brought at the close of the contract period to recover the balance due plaintiff when discharged, and for his services after discharge to the close of the year; and it is held:

1. That the admission of certain letters offered by plaintiff as tending to show his willingness to continue in the performance of his contract, was not error, although certain statements contained in the letters were immaterial and should have been excluded had the objection not gone to the letters as a whole.

2. Testimony offered by the defendant tending to show the amount of business done by the plaintiff on one of his trips, was properly excluded. A violation of the contract could not be infered because sales did not fulfill the expectations of defendant.

3. The fact that plaintiff, while on an eastern trip, left on Saturday to spend Sunday with his family in another city, would not amount to a violation of his contract of employment, in the absence of any showing that his leaving seriously interfered with his returning to the designated route in time to comply with his contract.

4. The fact that the court did not give certain specific requests would not justify a reversal, it appearing that the court, in his general charge, fully and fairly presented the questions raised.

5. The plaintiff having shown a performance of the contract up to the time of his discharge, the burden of proof rested upon the defendant to show a sufficient cause in warranting it in rescinding the contract.

6. It was error to allow the plaintiff to retain an amount earned during the holiday season on the ground that it was the custom of the trade to allow this privilege to traveling men, there being no showing that plaintiff had an agreement with defendant to this effect or that defendant had any knowledge of this custom.—*Milligand vs. Sligh Furniture Company.* (February 18, 1897.)

ESTOPPEL—SALE BY AGENT—ASSIGNMENT—TRUST DEED.—Goods were consigned by an agent of the vendor with the express understanding that the title to the original cases should remain in the vendor until paid for. The vendee became insolvent and executed a chattel mortgage to a bank and subsequently gave a second mortgage to a trustee for creditors, including vendor's claim. The trustee and vendor, by its agent, afterwards instituted proceedings to foreclose the second mortgage. Afterwards the vendor brought suit at law and recovered judgment.

Vendor's agent in the meantime had died and the principal at the time of suit had no knowledge of consignment contract and only acquired knowledge of such contract after the foreclosure proceedings instituted by its agent and after the judgment at law.

*Held:* 1. That the action of the agent operated as an election to treat the goods shipped on consignment as a sale and bound the principal.

2. That the principal having knowledge that the agent made shipments on consignment, it was its duty to act promptly and ascertain what the contract was and that its delay was not excusable.

3. An assignment of accounts need not be recorded, the assignment is valid when made bona fide and without intent to defraud.—*McDonald v. Snedicor.*

HEALTH OFFICER—EXTRA COMPENSATION—LEGALITY OF RESOLUTION—LIALILITY OF COUNTY.—In an action brought by the Village of St. Johns against the Board of Supervisors of Clinton County to recover an amount paid to the health officer of the village in compliance with a resolution adopted by the health board voting the health officer extra compensation during an epidemic of small-pox, it is held:

1. That the fact that the health officer was a member of the board of health of the village would not prevent a recovery by the village; it appearing that the health officer took no part in the proceedings to fix the compensation, that the services were performed, and that the charge was a reasonable one.

2. While the boards of health of townships, cities and villages are required to pay the ordinary services of the health officer, the statute, secs. 1647-48, Howell's Statutes, cast the burden upon the county for extraordinary services rendered to prevent the spread of contagious diseases, and for the care of indigent persons afflicted with such diseases.—*Village of St. Johns vs. Board of Supervisors.* (February 18, 1897.)

JUSTICE OF THE PEACE—APPEAL—ALLOWANCE BY CIRCUIT COURT—NOTICE—TIME.—Under subdivision 8 of sec. 10 of act 460, local acts of 1895, providing for appeals from Justice Courts, parties making application for an appeal must give notice to the opposite party by serving upon him, his attorney or agent, the petition and ground of the motion and the affidavit upon which the same is based; such opposite party shall have an opportunity to be heard before the Circuit Court before such appeal is allowed.

The length of time to be contained in the notice is governed by the Circuit Court rules pertaining to special motions.—*Scranton Lumber Co. vs. Donovan, Wayne Circuit Judge.* (February 18, 1897.)

SALE—DELIVERY—COMPLIANCE WITH CONTRACT.—Action on a contract for the erection of a granite monument and three markers which were to be delivered and set up in a cemetery, on or before a certain date, and it is held:

That the contractors had the right to remedy defects in the monument before tender and delivery and that delivery was not made at the time the monument was taken to the cemetery but when it was finally put in place. The contractor having, before tender and delivery, remedied all defects in the construction of the monument so as to make it comply with the contract, was entitled to recover the contract price. —*Black vs. Herbert.* (February 18, 1897.)

## CURRENT LITERATURE.

Houghton, Mifflin & Company, in their March number of the *Atlantic Monthly* present a very enjoyable literary feast. "The Story of an Untold Love," does not lose interest and that is strong praise, for the earlier chapters of the novel have already been applauded through the columns of this department. Paul Leicester Ford promises to be one of the standard writers of this decade. His former novel, "The Honorable Peter Sterling," is so out of the usual run of late novels; so very entertaining, that if the writer's pace keeps up he will distance all others in the race for popularity. This later story promises a continuance of the popularity accorded the writer by reason of his other novel already mentioned. "Marigold-Michel," a a short story by Blanche Willis Howard, is also very fine in both its conception and treatment. "Mr. Cleveland as President," and a continuance of "My Sixty Days in Greece." are also presented. To a lawyer the article by Francis C. Lowell on "Legislative Shortcomings," is very interesting and instructive. It shows thought and study in every sentence, and would furnish ideas for quite a number of political speeches.

This is a suggestion of the contents of one number of one of the best of the $4.00 magazines.

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*Appleton's Popular Science Monthly* for March contains another of Hon. David A. Wells' articles on "Principles of Taxation," and this one is on the "rules or maxims essential to an administration of rightful taxation under a constitutional or free government." "The Physiology of Alcohol" records the effects of alcohol on the physical and mental condition of several kittens. Its effects eventually became very apparent and the kittens *treated* soon came to lose all playfulness. Under the title "A Year of the X Rays," Prof. D. W. Hernig records the development and advance of the remarkable discovery of Prof. Roentgen from the time of its first recognition by science.

A continuance of "The Racial Geography of Europe," in the same number, is also very interesting. This latter is the leading article for the month. India Rubber and Gutta-Percha is another article which will please almost all readers.

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"The Progress of the World," in the March *Review of Reviews*, is all we could expect. The war scare of Europe receives its full share of attention, and local matters of moment are not neglected. The usual departments and several articles, one on "Her Majesty Queen Victoria," make up a very good number.

# MICHIGAN LAW JOURNAL.

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## *LEGAL STATUS OF THE BICYCLE IN MICHIGAN.*

LINDSAY RUSSELL.

The legal status of the bicycle was determined for the first time in Michigan, in July, 1896, by the supreme court in the case of Meyer vs. Hinds, which follows judicial decisions in other states and holds the bicycle to be a vehicle. Such being the law, fast riders can be prosecuted under existing ordinances applicable to vehicles and carriages. Toll roads can probably collect toll from them under the Plank road Act of 1848.

The bicycle is subject to the present law governing the use of vehicles on highways. A man who fails in business would probably be entitled, upon a proper showing, to have a bicycle exempt from execution, on the ground that it is a vehicle and reasonably necessary to aid him in carrying on his profession or business.

The right of the wheelman to use the roads of this state was established long before the advent of the bicycle in Michigan and while the wheel was still excluded from many roads, streets and parks in eastern states, the privilege of riding on Michigan roads was secure to those few who chose to exercise it, under the case of *Macumber* v. *Nichols*, *34 Mich., Reports*. About nine o'clock in the evening of September 9th, 1874, Mr. Nichols was driving on the highway near Battle Creek and his horse took fright at a small road

engine, running along the same highway. He brought suit for damages to person and property. Each party claimed to be free from negligence himself and charged negligence upon the other. Macumber said that he was running his engine on the extreme right of the travelled way and at a moderate rate of speed. The principal ground upon which the plaintiff relied however, was that the engine was an unusual and dangerous vehicle on the highways and was calculated to frighten horses of ordinary gentlemen. But he failed to recover. Judge Cooley said that persons making use of horses as the means of travel or traffic by the highways have no right thereon, superior to those who make use of the ways in the modes.

Improved methods of locomotion are admissible if they shall be discovered, and can not be excluded from the existing public roads. The highway is open to all suitable methods of locomotion and it can not be assumed these will be the same from age to age, or that new means of making the way useful must be excluded because their introduction may tend to the inconvenience or even injury of those who continue to use the roads after the same manner as formerly. Although the wheel was scarcely known and its extended use certainly not thought of at that early date, yet Judge Cooley seemed to think it advisable to anticipate improved methods of locomotion. Ten years after this decision a writer and observer of the highways was considered a crank who said that in less than a quarter of a century we would see thousands of young men riding bicycles and hundreds of women and old men on tricycles.

A most important question involving the status of the bicycle, is likely to come before our courts at an early day. Can railroads of this state, under existing law, be compelled to carry bicycles as baggage without requiring a release from all claims for damage in case of injury to the machine? Baggagemen, as a rule, hate a bicycle, and the manner in which they handle it is very careless.

Under the statute, railways accept baggage, limited in weight with a passenger, and must give a check for it provided there is a "loop, fixture or handle attached upon the parcel or luggage." The statute does not specify what shall constitute baggage, but there is little doubt that under the law a bicycle is baggage as much as a trunk. It is the custom of the railroads to accept many articles, as baggage, which were far more bulky and inconvenient to handle than bicycles.

The definition of the word "baggage," as found in the law of common carriers as given by the courts, includes whatever the pas-

senger takes with him for his personal use or convenience, either with reference to the immediate necessities or ultimate purpose of the journey, and not merchandise and other valuables.

An interesting suit is now pending in one of the western states against the Missouri Pacific railroad, to test the question whether railroads shall be permitted to discriminate against bicycles.

The legislature of Michigan has not, so far, passed any laws pertaining to the bicycle, except in 1895 to provide for the incorporation of clubs of the League of American Wheelmen. However, many bills are likely to be presented. Legislation providing for permanent highways and improvement of the present roads will be insisted upon, and for such enactments the wheelmen will ever pray.

An act empowering counties to raise money to construct sidepaths along the public roads is a matter worthy of consideration.

A law to declare bicycles baggage, to be transported by railroads, subject to the same liabilities, and to be delivered to passenger within thirty minutes after presentation of check.

A law to prevent the placing upon any public street or highway any broken glass, metal, loose stones, earthenware or other substance of a nature likely to cause injury to travellers, vehicles or bicycles, or which might puncture any pneumatic tire.

An act to compel by January 1st, 1900, the use of wide tires, proportioned to the load to be carried, and to provide a bonus to be paid the owners of wagons who will widen their tires before the law compels it. (A city ordinance exists in Dotroit compelling the use of wide tires).

The bicycle has come to stay. Its influence is being felt in almost every branch of trade and every department of life. Its advance, like that of many other important inventions, was in the face of violent opposition and many men have not yet overcome their prejudice. Ten years ago a man who rode a wheel was regarded as a crank, and even five years ago scarcely a woman would have dared to appear on the streets riding a bicycle.

Bicyclists are indebted to the now veterans of the League of American Wheelmen for almost every privilege they enjoy. The money this organization spent and the persistent fight it made to establish the rights of wheelmen, entitles it to the respect and support of every man who rides a wheel. It is at present conducting a universal crusade for good roads which is sure to be successful.

The wheelmen of Michigan must insist upon good roads. Let our local wheelmen look to the highways of Wayne county. For

many years the farming element has opposed the expenditure of money in this direction, but now that almost every farmer's son has a wheel, or wants one, the contest for good roads will soon terminate in victory for the bicycle.

The superb highways of Europe are the result of the necessities of commerce, and was of centuries ago. A few years hence we will look with admiration upon a work of improved highways and accredit them to the necessities of the man who rides a wheel.

# THE LEGAL ASPECT OF THE MAYBRICK CASE.*

CLARK BELL, ESQ., OF THE NEW YORK BAR.

The report of the Woman's Committee of the Psychological Section of the Medico-Legal Society presented for discussion at the October meeting of that body for action, presented the following propositions:

Your committee are of the opinion that the case of Mrs. Maybrick is one that is fairly within the realm of the Medico-Legal Society and notably of the Psychological Section.

We are of the opinion that the verdict of the jury was not supported by the evidence of that case.

We concur in the opinion expressed by Sir Charles Russell, now Lord High Chief Justice of England, in commenting upon the unfair charge of Sir James Fitz James Stephen, the trial justice in his charge to the jury. "He passionately invited the jury to find a verdict of 'Guilty,' taking two days to sum up the first day as a judge and on the second day raged like a violent counsel for the prosecution."

We believe that the language of the charge of that trial judge, was in violation of that principle of the law of England, which forbids a judge to permit a jury to ascertain, from either his language or manner the judge's opinion of the merits of the controversy they are to decide upon. While we recognize the extraordinary power conferred upon the trial judges in homicidal cases in England, and the right sometimes exercised by the British judges upon what may be fairly deemed their discretionary or even paternal power, either over the accused or the majesty and spirit of the law, we are still of the opinion, that among all English speaking people, there will be no two opinions among jurists throughout the world, that Sir James Fitz Stephen on his trial transcended the true spirit of the Law of

*This article being too long for publication in one number, its conclusion will appear next month.

England, in his animadversions against the accused before the jury who had to decide her fate.

We believe that if the eidence in the Maybrick case could be under English usages submitted to an English Court of Review the verdict of the jury would be set aside and that judgment reversed for errors of law.

We concur in the opinion expressed by the eminent English counsel Sir Charles Russell, (now Chief Justice,) Fletcher Moulton, Q. C., Mr. Poland, Q. C., and Mr. MacDougal, after a careful review of the evidence with a view of determining whether in their opinion the verdict was justified by the evidence, that the verdict of the jury was not justified by the evidence.

We are of the opinion that the action of the Home Secretary in commuting this sentence fell short of what it should have been, because if the verdict was right and legal it should not have interfered with the proper punishment of a poisoner, and that if the Home Secretary intervened at all it should have been for a full release.

We are of opinion that the verdict of judicial opinion throughout all Christendom will be: That if under the law of England an illegal conviction cannot be remedied under existing forms and usages under the British constitution and laws, then that the right of appeal should be engrafted in all cases where human life is at stake, upon the present English system, to prevent miscarriage of justice in future cases.

We rejoice that under the British constitution there is one woman in England, who has the power and the right to interfere and do justice in this case. We remember her long and splendid reign, unsullied by one unwomanly act; her strong sense of justice, her fearlessness in doing what she believes to be right, and we appeal to her to end this unfortunate controversy, by granting a full pardon to this unfortunate woman before death prevents; because she can legally grant her a pardon, even if she doubts her innocence, without offence to her own conscience, while she would gladden the hearts of a million of her sisters in America who believe that Florence E. Maybrick is innocent of the crime for which she now suffers a lasting imprisonment. All of which is respectfully submitted.

Dated September 9th, 1896,

CAROLINE J. TAYLOR, *Chairman.*
M. LOUISE THOMAS,

C. VAN D. CHENOWETH,
ROSALIA DAILEY,
THE COUNTESS BETTINI DI MOISE,
LAURA A. C. MILLER,
SOPHIA MCCLELLAND,
SARA W. M. LEE,
REV. PHEBE A. HANAFORD,
FLORENCE DANGERFIELD POTTER,
IDA TRAFFORD BELL,
ROSALIE LOEW,
*Committee.*

That report after an animated discussion received the endorsement and approval of the Medico-Legal Society at the October session of 1896.

The decision of Mr. Matthews, Q. C., the then Home Secretary, in the case of Mrs. Maybrick, was thus announced, (except Italics, which are mine) :

"We are given to understand that the Home Secretary, after the fullest consideration, and after taking the best medical and legal advice that could be obtained, has advised Her Majesty to respite the capital sentence on Florence Maybrick and commute the punishment to penal servitude for life; inasmuch as though the evidence leads clearly to the conclusion that the prisoner administered *and attempted to administer* arsenic to her husband *with intent to murder*, yet it does not wholly exclude a reasonable doubt whether his death was in fact caused by the administration of arsenic."

In the subsequent life of the presiding judge, the late Sir James Fitz James Stephen, by his brother Mr. Leslie Stephen the matter is thus stated: (It will be seen that Mr. Leslie Stephen, who do doubt had legal assistance in this part of his narrative, omits all reference to the words which are italicised, and which were, of course, not italicised by the Home Secretary).

"The sentence was afterwards commuted to penal servitude for life with Fitz James' approval and I believe at his suggestion, upon the ground, as publicly stated, that although there was no doubt that she administered poison, it was possible that her husband had died from other causes."

And in a new edition of his *General View of the Criminal Law of England* published some months after the trial, the judge describes the case of Mrs. Maybrick as the only one out of a large number tried before him in which there was "a doubt as to the facts."

Mr. Lincoln, the American Ambassador, had an interview with Lord Salisbury on the subject before the decision was publicly announced and he reported to his government as follows:

"His Lordship at once replied that the subject had been anxiously considered, and that he believed he could say that the death sentence would not be executed, as all the medical evidence attainable, left a reasonable doubt as to the death having been caused by the arsenic, administered by Mrs. Maybrick."

And in his subsequent answer to an American petition Lord Salisbury said:

"Taking the most lenient view which the facts proved in evidence and known to Her Majesty's Secretary of State admit of; the case of this convict, was that of an adulteress attempting to poison her husband, under the most cruel circumstances, while she pretended to be nursing him on his sick-bed."

In the face of these declarations by the judge, the Home Secretary and the Prime Minister, the idea may be dismissed that the Government was convinced that the prisoner had really murdered her husband, but looked for some excuse to avoid an execution, which would have created a popular outcry: I was in England at the time of this trial, and I was in a situation to come more or less in contact with public opinion there, outside of Liverpool; and I then formed the opinion, that great doubt existed in the public mind as to the guilt of the accused.

There was also felt in English circles, a strong sense, that the trial justice had not dealt at all fairly with the accused in his charge to the jury.

I then formed the opinion which I still entertain, that had not the Home Secretary interfered and prevented the public execution of Mrs. Maybrick, the public feeling then ran so high, that a change in the English system would have been insisted upon by the general public clamor; giving the right of appeal in capital cases, as a matter of strict right to all condemned to death. It seems clear, that the doubt whether Mr. Maybrick had died of arsenic was really and generally entertained.

What seems to have been wanted, was not an excuse for sparing her life, but an excuse for not setting her at liberty; and a perusal of the medical evidence, given at the trial will satisfy any impartial reader that there were very grave reasons for doubting, whether Mr. Maybrick died of arsenic; while the difference of opinion on that subject continues to agitate the medical profession up to the present.

It will further, I think, be conceded that no evidence tending to prove that Mr. Maybrick died of arsenic, has been procured since the trial, but that on the contrary a good deal of evidence has been procured, which increases the doubtfulness of the cause of death.

*What then is the legitimate result of a reasonable doubt as to the cause of death in a case, in English courts, where the prisoner has been convicted of murder?*

Mrs. Maybrick was tried on a single count which charged her with having "at Garston, on the 11th of May, 1889, feloniously, wilfully and of her malice aforethought killed and murdered one James Maybrick by the administration to him of poison."

Arsenic being the poison relied on by the Crown, the judge told the jury:

"It is essential to this charge that the man died of arsenic. This question must be the foundation of a verdict unfavorable to the prisoner that he died of arsenic."

Therefore, if the jury had entertained the same doubt as to death by arsenic which the judge, the Home Secretary and the Premier, entertained; is it clear that they must have found the prisoner Not Guilty of the only charge with which they had to deal? Now on any principle of reason and justice why should the fact that the jury had arrived at a wrong verdict on the evidence before them, have militated against the prisoner? The Home Secretary should have dealt with the prisoner as if the right verdict had been found. This was done in the famous case of Dr. Thomas Smelhurst, which, in many of its features closely resembled that of Mrs. Maybrick. The report on which he received a free pardon, stated that "though the facts were full of suspicion against Smelhurst, there was not absolute and complete proof of his fault." And only four years before the Maybrick trial the then Home Secretary, Sir William Vernon Harcourt granted a free pardon to Mr. John Hay, because there was "a doubt as to his identity." Since the Maybrick trial too, the Home Secretary refused to admit that there was anything more than a reasonable doubt in the case of John Kelsall, whom he released. The detention of Mrs. Maybrick on the conviction for murder cannot, therefore, be sustained after the admissions of the judge, the Home Secretary and the Premier. The only question is whether a life sentence can be justified on the ground relied on by the then Home Secretary, viz: That the evidence clearly leads to the conclusion, that she had administered and attempted to

administer arsenic to her husband with the intention of murdering him.

*Did the jury find this, or ought they to have found it?*

That the jury did not find it is clear. No doubt in finding that Mrs. Maybrick "feloniously, wilfully and of her malice aforethought" killed her husband by administering poison to him they found that she "administered poison to him feloniously, wilfully and of her malice aforethought." Probably the reason why they arrive at this finding was that they thought the poison killed him. They did not think that even if he was a habitual arsenic-eater he would take enough to cause death, or else they thought that if he did chance to do so, he would at all events have told the doctors and asked them for an antidote. The part of the verdict which the Home Secretary upheld was therefore in all probability dependent on that which he rejected; and in fact, if it were conceded that Mr. Maybrick's death was not caused by arsenical poisoning, the evidence of any wrongful administration of arsenic would be very weak. But what the jury found was that the arsenic was administered by the prisoner "feloniously, wilfully and of her malice aforethought." The Home Secretary substituted for these words "with intent to murder." But the import of the phrases in English law is altogether different, and the difference materially affects the prisoner's punishment.

It has recently been held in England, that killing a woman by means of an illegal operation is wilful murder. Performing an illegal operation is a felony and if the woman dies in consequence, the operator has killed her feloniously, wilfully and of his malice aforethought.

In another well-known case killing a policeman in the discharge of his duty was held to be wilful murder. In both these cases there was no intention on the part of the convict to kill his victim. This distinction, indeed, is not only pointed out but defended, in Sir J. F. Stephen's works on the Criminal Law (see for instance the article *Murder* in his "*Digest of the Criminal Law*"). And in the case of Reg v. Cruise reported in 8 Carrington and Payne, Mr. Justice Patterson told the jury that a crime which would be murder if the victim died might not be an attempt to murder if he recovered—the distinct intention to kill, which was essential to the latter crime, not being essential to the former.

The popular distinction sometimes drawn, that murder is a successful attempt to kill, while attempt to murder is an unsuccess-

ful attempt to kill, has no foundation in English law.

Murder may not be an attempt to kill at all. The person who performs an illegal operation on a woman does not intend to kill her, but quite the reverse. He wishes for many reasons that the patient will recover, but if she dies the crime is murder notwithstanding under English law. And comparing the decision as announced by Mr. Matthews, with that which Mr. Leslie Stephen attributes to his late brother in his life, we at once notice that the latter has omitted the words "with intent to murder." The judge knew that the jury had not found anything of the kind, and evidently confined himself to what they did find; but the Home Secretary went beyond what the jury found and added a finding of his own—a finding on which he afforded the prisoner no opportunity of producing either evidence or argument, pronouncing sentence.

But why did the Home Secretary thus go outside of the verdict of the jury? The answer is plain. In order to obtain an apparent justification for the sentence of penal servitude *for life* which he meant to impose. Had the prisoner been convicted of feloniously, wilfully and of her malice aforethought, administered poison to her husband with intention to injure, aggrieve or annoy him, the maximum sentence would have been three years penal servitude. Mrs. Maybrick has been in penal servitude for upwards of seven years. If, indeed, the jury had gone on to find that her husband's life had been endangered by the administration, ten years penal servitude (which in the case of a female convict in England is reducible by one-third for good conduct) would have been possible as the maximum sentence. It might perhaps be argued that the jury, in finding that the man died of the arsenic administered, found that his life had been terminated by the administration. But it seems inconceivable that any reader of the medical evidence could have arrived at the conclusion that life had been undoubtedly endangered by the administration of arsenic, though it was doubtful whether death had resulted from it. The doctors who ascribed the symptoms of disease to arsenic also ascribed death to it, and the doctors who said that death had not resulted from arsenic, made the very same assertion about the preceding illness.

It seems clear that the arsenic (whoever administered it) either killed Mr. Maybrick or did him no perceptible harm. But even if we waive the point, the difference between a life sentence and one of ten years is immense. And what reason have we to think that, if the jury had convicted Mrs. Maybrick of a criminal administration

of arsenic which endangered her husband's life, the presiding judge would have imposed the maximum sentence on a delicately nurtured woman in feeble health and a first offender?

As regards the Home Secretary's charge of attempting to administer arsenic with intent to murder, the case is still clearer. The finding of the jury related to actual administration only. They made no finding whatever as to what the prosecutors themselves described as "an unsuccessful attempt." Still less, of course, did they find that the unsuccessful attempt was made "with intent to murder." And here again Sir Leslie Stephen is silent as to the judge's concurrence. He probably saw that the Home Secretary was again travelling outside of the verdict—looking for something that might tend to satisfy the public mind—without regard to whether it could be legally justified or not.

The Home Secretary has not, I think, ventured to cite an English statute which enables a jury, on a trial for certain offenses, to convict the prisoner of an attempt to commit these offenses. I am not aware that this statute has ever been applied to a trial for murder, and, judging from the preamble, I do not think it was intended to apply to such a trial. At all events, it was competent for the jury to have found a verdict of guilty of attempt to murder, in general terms, they could not have returned a verdict in the terms of the Home Secretary's decision, which does not charge Mrs. Maybrick with attempt to murder, in general terms, but charges her specifically with two distinct kinds of attempt, which come under two distinct sections of the corresponding statute (24 and 25 Victoria, Chapter 100, sections 11 and 14). But whether it was or not competent for the jury to have convicted her of *an attempt to murder*, they did not either in terms or by implication convict her of that crime. And if the Home Secretary claims the right of substituting for the actual verdict of the jury that which, in his opinion, they ought to have found, but they did not in fact find, how does this differ from punishing the prisoner for an offense of which he or she has never been convicted?

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## *NOTES.*

There is a bill before our state legislature which, if passed, will place the Detroit College of Law on the same footing with the law department of the University of Michigan, at least in respect to the examinations for admission to the practice of law. Such a law would be a fitting acknowledgement of the splendid work which the Detroit school is accomplishing.

The school has been making very rapid strides in the past few years, and from a position of obscurity it has forged ahead until now its reputation, as a preparatory school for the legal profession, is well established. The showing of the last graduating class, which went before the state examining board in July of last year, was especially gratifying to those interested in the welfare of this new institution; for after a most rigorous and thorough examination, covering a period of three days, the committee passed the entire class of thirty-five students, and complimented them highly on their creditable work.

The act, granting to the Detroit College of Law equal rights with the law department of our state university, whereby its classes enjoy the same privilege of admission to the bar on motion, is fair and reasonable, and should become a law at once.

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The Sherman Anti-Trust Law has recently enjoyed a day in court, and the highest tribunal of the United States, by its decision in the case of the *United States* v. *Trans-Missouri Freight Association*, has given that act a firmer foundation, and a yet broader interpretation than was perhaps contemplated when the act was passed by congress.

The main object of the law, at the time of its enactment, seemed to be directed more especially against those vast combinations of capital, which had by their enormous power, begun to threaten the very peace and prosperity of our country. The law expressly prohibited contracts or combinations in the form of trusts, entered into for the purpose of restraining trade or commerce; and we need only to mention such monopolies as the Standard oil, the sugar, the beef, the steel and many another trust, to suggest the urgent necessity of such a law as the Sherman Anti-Trust Act.

But now, in the case of the *United States* v. *Trans-Missouri Freight Association*, the application of the trust law is made to reach an evil, which though similar in effect to the so-called trusts, yet, as a combination or monopoly, it takes quite a different form.

The majority opinion, as written by Justice Peckham, is a splendid and logical interpretation of this very important law. The main questions involved in this particular case were, first, as to whether the anti-trust act applied to and covered common carriers by railroad, and, secondly, if so, whether an agreement entered into by them, regulating and fixing a uniform freight tariff, was in violation to any of the provisions of that act.

The defendants contended strongly against both propositions, but insisted, that even should they be declared to come within the meaning and application of the anti-trust law, yet the common law meaning "in restraint of trade" includes only such contracts as are in unreasonable restraint of trade. The supreme court, however, rejecting this interpretation of the law, decided both points in the affirmative as against the defendant railroads. In regard to the right of an association of railroads to mutually agree upon a "reasonable" freight tariff, Judge Peckham said: "Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves, by virtue of the agreement, so long as they abide by it."

This decision is considered of vital importance to common carriers in general, and practically insures that every railroad and transportation company will be compelled to shift for itself, which will inevitably result in a very lively competition among them.

Such a disposal of the case, in which combined capital is given a set-back, is sure to meet with general approval; and the public at large is certain to enjoy some benefit or advantage, resulting from this pleasing termination of the case.

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In a criminal trial recently concluded at Auburn, N. Y., in which a verdict for conviction was brought in against the prisoner, Frank Sheldon, for wife murder, we are confronted with a question of some importance, relative to the treatment of juries and as to

how long they should be held in confinement after a failure to come to an agreement.

The case was remarkable in more than one regard, for not only was the trial of very unusual duration, occupying a period of forty-seven days, but the conduct of the jury after their retirement, and their stubborn holding out was also exceptional. For eighty-four hours the jury remained steadfast in their inability to agree, and time and again returned to the court-room either for instructions or to announce their disagreement, but were as often sent back with the injunction that "they must find a verdict"; and not until a lapse of that time did they finally agree upon a verdict for conviction. This case only illustrates many of a similar nature where, it may be said, the judge is directly responsible for the verdict, and not the jury. Of course it is commendable on the part of the court to hold a jury a reasonable time in the hope that all the labor and expense which necessarily attends a long trial shall not be wasted; but for a court to assume the right to insist on the finding of a verdict after the lapse of such time is unreasonable and unjust. The fact that a jury, after ample time to thoroughly consider the evidence, arguments of counsel, and the charge and repeated instructions of the court, announce that they are unable to agree, then any further arbitrary compulsion of the court by which they are forced to consider the case, is simple oppression and duress, and any verdict rendered under such circumstances cannot be said to be the free exercise of the judgment of the jurors, and hence cannot be taken as their free conclusion and verdict.

## *LEGAL MISCELLANY.*

The North Dakota Legislature has enacted a law which provides that no person shall be disqualified for jury duty because he has expressed an opinion founded on newspaper reports or upon rumor.

A bill has been introduced into the House of Representatives of Massachusetts forbidding "the public representation of prize fights, boxing matches and sparring matches by the kinetoscope or other similar process."

Indiana law-makers are considering over fifty bills that have been introduced in the legislature for the purpose of restricting the powers of corporations.—*The Legal Adviser.*

The North Carolina supreme court has lately decided that an action for damages will lie in favor of a husband against a druggist, who, in violation of the husband's express orders, has sold laudanum to his wife, in consequence of which she has become a victim of the opium habit.—*The Legal Adviser.*

An interesting and what will probably be a popular measure has been introduced in the Minnesota legislature bearing the title "An act to prevent the fostering of crime and morbid sentimentality." It provides that any person who shall give or offer to give or send flowers or any other token of sympathy or admiration to a person under arrest charged with a crime amounting to a felony, or under or awaiting sentence for a crime amounting to a felony shall, unless such person stands in the relation of a husband, wife, child, parent, brother or sister to such criminal accused, or is an ordained minister of the gospel, be guilty of a misdemeanor, and on conviction thereof be punished by imprisonment in the county jail for a term of not less than fifteen nor more than ninety days, or by a fine of not less than $25 nor more than $100.—*Washington Law Reporter.*

The law courts of San Francisco will soon be called upon to decide a novel case, in which the right of a stereopticon company to project its pictures upon the dead walls of a building is in question. The parties to the prospective litigation are the trustees of the Parrott estate and the Lantern Advertising Company. One of the landmarks of the Golden Gate city is a huge structure on Market street owned by the plaintiffs, and known as the Parrott building, whose high walls, rising far above the roofs of adjoining buildings, and painted a solid drab color to corrospond with the stone front of the building, present an enticing surface for the projection of images—a sort of huge ready-made screen for the lantern-slide advertisements. In addition to this, is the fact that the building is located on the busiest thoroughfare of the Pacific coast metropolis, just where the night crowds of theatre-goers and promenaders can best see what is going on. The lantern-slide people did not attempt to get the permission of the trustees of the Parrott estate to use the dead walls; they simply obtained the consent of the owners of the adjoining buildings to place their apparatus on the roof, and nightly these blank, dead walls have blazoned forth the superior advantages of certain brands of soap, hair dyes, cigars, tooth powders, etc., etc., together with race-track quotations and other interesting, if not valuable, information. Right here has come the conflict. The Parrott estate has ordered the Lantern Advertising Company to desist, setting up the claim that the building, both inside and out, and the land on which it stands, from the center of the earth to the sky, is its property, and subject to its exclusive control. That the enjoyment of every return of every sort from the property is in the plaintiff and no one has a right to decorate it even temporarily. It will be interesting and instructive to learn what will be the decision in the case as a good argument could be found on either side.

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"Ten dollars," said the Magistrate.

"But your Honor," said the prisoner, "I protest against this fine. I have a right to make a defense against the charge."

"But you have already pleaded guilty," said the Magistrate.

"I beg your Honor's pardon; I denied the charge in the plainest terms."

"Young man," said the Magistrate sternly, "I want to call your attention to the fact that the court understands the English language. You have pleaded guilty in unmistakable words. The plaintiff charges you with assault and battery. It is clearly evident that he has been assaulted and battered. According to your statement, he approached you on the street and used abusive language toward you. Then you say that you 'didn't do a thing to him.' If the court understands the language spoken by seventy millions of people, you immediately wiped up the earth with him. The fine stands, and any further reflection upon the court's knowledge of English will cost you ten more.—*Detroit Free Press.*

Criminal liability for the reckless riding of a bicycle was visited with a sentence of four month's hard labor in the English case of Regina v. Parker, which was tried at Lewes Assizes. The defendant was charged in an indictment with manslaughter and also with furiously driving a carriage or vehicle contrary to section thirty-five of the Offenses Against the Person act of 1861. The sentence was imposed upon a plea of guilty to the second indictment. This plea was accepted, although the prosecution considered that a conviction for manslaughter would be supported. The Law Journal quotes Mr. Justice Hawkins as saying that the counsel for the prosecution had very mercifully asked only for a conviction on an indictment to which the prisoner was ready to plead guilty, and he was glad that some one had thought fit to put the law in motion, and let those who were careless and reckless of lines of others know that they were punishable by law. The justice also said that a man or woman who rides a bicycle is bound to conduct it with care and caution, and no more entitled to ride recklessly and furiously than to drive a cart at a furious pace through the street.

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In Germany there is no matter so small or so trivial that it has not its laws and ordinances. To the mind of the German police officer these, and all these, are as important as the decalog. A young Englishman was riding early one morning in a certain public park, and seeing a bench near by and no one in sight, he jumped his horse over it, when, to his amazement, a man appeared and told him he had broken such and such a law, and fined him a mark. In Germany the policeman is first a constable, next the witness for the prosecution, then the jury, and last the judge who pronounces sentence—all in one breath. "You must pay a fine of one mark for jumping your horse over that bench" he said. The rider claimed that no harm had been done and that both the bench and the park were empty at the time. But the official said: "No, you have broken the law." So the law-breaker put his hand in his pocket and handed the officer a two-mark piece. "But," said the policeman, "I can not change this. "O! that makes no difference," replied our young horseman. "I'll just take another jump,"—which he did, without waiting for further instruction in the law of the land.

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An important decision was rendered by the supreme court of the United States, on Monday, March 22, in the case of *The United States* v. *The Trans-Missouri Freight Association*. The decision of the court below that the act of 1890, known as the Sherman anti-trust law, did not apply to railroads, is reversed, the supreme court holding that the law is applicable to railroad transportation, and that the traffic agreement involved in the suit is illegal. The decision of the court is by Mr. Justice Peckham, and is a thorough review of the

history of the case. The suit was originally brought on behalf of the United States to set aside the agreement which constituted the association to fix rates of transportation over the various roads composing the pool, as being in violation of the provisions of the anti-trust law. In concluding the discussion as to the applicability of the law to railroads, the court says: While the statute prohibits all combinations in the form of trusts or otherwise, the limitations is not confined to that alone. All combinations which are in restraint of trade or commerce are prohibited, whether in the form of trusts or in any form whatever. In discussing the true construction of the law, assuming that it applied to railroad combinations, it is said: "The claim that one company has the right to charge reasonable rates and that therefore it has the right to enter into a combination with competing roads to maintain such rates cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the event of the charge for the service will be seriously affected by the fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement to keep prices up competition is allowed no play; it is shut out and the rate is practically fixed by the companies themselves by virtue of the agreement so long as they abide it."—*Washington Law Reporter*.

## BOOK REVIEWS.

THE FEDERAL COURTS, THEIR ORGANIZATION, JURISDICTION AND PROCEDURE.--Lectures before the Richmond Law School, Richmond College, Virginia. By CHARLES H. SIMONTON, U. S. Circuit Judge. Richmond, Va.: B. F. Johnson Publishing Co. 120pp. $1.50.

This volume gives the law covering the practice in the federal courts in a brief but forceful manner, and is able and most satisfactory. It will be a great saving of time in the preparation and conducting of cases in the federal courts.

The book would be much more valuable to practitioners if the different subjects were divided off into paragraphs and numbered, and the subject printed in heavy type so the book could be better indexed, and the practitioner could more readily refer to such subjects as he wished to use. The book should have a place in every working library.

THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND. By CHARLES M. HEPBURN, of the Cincinnati Bar. W. H. Anderson & Co., Cincinnati. 318 pp. Cloth, $3.00; Law Sheep, $3.75.

How greatly the procedure under a code differs from that under the common law few lawyers of the state of Michigan realize. Michigan has been conservative; perhaps too much so. Its court practice is that of the common law and has been little affected by the developments along the novel lines of court pleading and practice, so largely favored throughout the other states. In this book is presented an account of the rise, development and progress of code pleading. Without such a book few could know or appreciate how wide has been that progress; how harmonious the development. The codes are treated of not section by section, that would be tedious—but as a whole. The peculiar features of this newer practice are brought out distinctly and from a perusal of the book one's ideas of the differences in the two systems are crystallized. In a very painstaking careful way the writer has gone into an investigation at first hand of all the codes; traced out the rise of the ideas embodied in them; shown how each has developed and to what it is indebted for language and ideas; called attention to the fact that in particular instances the exact language of one has been followed in another. The volume shows a rare faculty of analysis in the writer and a happy ability to state complex ideas simply. The book is of unusual merit but in Michigan is of more value as teaching progressive and advanced ideas than a help for the practicing lawyer. It is a strong argument for a code system of court practice.

HAND-BOOK ON THE LAW OF PARTNERSHIP.—By WILLIAM GORGE, of the St. Paul Bar. St. Paul: West Publishing Company. One vol., 8 vo. 606 pp. $3.75.

This book is not intended as an exhaustive treatise on the law of partnership, but rather to state in an accurate and concise way the law that pertains to partnerships in the present progressive age. Since the earliest treatises on this subject were written, many changes have taken place in the manner of doing business, and the surroundings are very different. The author has endeavored to state the law as is established and maintained by the most modern and best authorities and opinions. Such a book is very valuable to one who must know the law as it now is, and have it separated from the old and absolute views held fifty years ago. It also affords a ready reference to all the modern decisions on the various points under discussion.

If in making any very elaborate brief, it is deemed advisable to go minutely over the various branches of partnership law, this volume will prove a key to unlock the complete libraries of elementary law on this subject, and also afford references to all the decisions pertaining to the same.

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HAND-BOOK OF THE LAW OF PRIVATE CORPORATIONS.—By WILLIAM W. CLARK, JR., Instructor in Law in the Catholic University of America, and author of Hornbooks on "Criminal Law," "Criminal Procedure," and "Contracts." St. Paul: West Publishing Company. One vol., 8 vo. 729 pp. $3.75.

There are many elementary books on the law of corporation, but this covers a field, to a certain extent left unimproved. The author discusses the law of private corporations. There are few subjects in the law in which more difficulties arise or more conflict of authorities exist. It is not to be wondered at, since the law of private corporations are so generally regulated by the various statutes of the different states, and they are as different as they are numerous. Different courts have also held differently on many questions arising under corporate powers and restrictionss so that the law in many respects is quite unsettled. The author has attempted to harmonize opinions and settle the differences, and set forth the law as sustained by the weight of authorities on the controverted points. The entire work has been written from the cases, and he has succeeded in putting the law as it is now made and sustained by the best modern authorities, in a clear and concise shape, and he has divided it into sections and paragraphs, in such a happy way, and indexed it under such a methodical plan, that the book can be made useful to the hurried practitioner in the shortest time and in the most accurate manner possible.

# RECENT MICHIGAN DECISIONS.

ACTION TO RECOVER COMMISSION ON SALE OF LOGS—EVIDENCE.—In an action to recover a commission alleged to be due for negotiating the sale of certain logs, it is held: That it was not error to admit in evidence the testimony of one of the vendors, taken by deposition, to the effect that the vendee made the purchase by virtue of an option of the plaintiff.

Where no objection was made to an interrogatory nor answer upon the first trial, the right to object upon the re-trial was not waived.

It was not error for the court to refuse to allow the vendee to testify as to whose judgment and what information he relied in making his purchase.

The fact that a witness, who had seen a portion of the logs, was allowed to state his estimate of the entire quantity, was not erroneous, in view of the fact, that the total number of feet of the logs and the amount of the commission did not depend upon the testimony.—*Burrell* v. *Gates*. (April 6, 1897).

BILL IN AID OF EXECUTION—DEFECTIVE BILL—CHARACTER OF PROPERTY COVERED BY REAL ESTATE MORTGAGE—EFFECT OF CHATTEL MORTGAGE EXECUTED SIMULTANEOUSLY WITH REAL ESTATE MORTGAGE.—Bill filed to set aside a real estate mortgage which included personal property and a chattel mortgage executed on the same date covering the same property, on ground that the first mortgage covered the real estate only that the chattel mortgage was not filed until after the indebtedness of complainant accrued. The bill set up that complainant's execution had been returned unsatisfied by the sheriff and asked that he be authorized to proceed under his writs of fieri facias upon said judgment, and it is held:

That the bill cannot be sustained as a bill in aid of execution, inasmuch as a levy should precede the filing of such bill, and that the bill is likewise defective in that it fails to sufficiently aver the return of an execution unsatisfied for want of property upon which to make a levy.

The giving of a chattel mortgage concurrently with a real estate mortgage which also covers personal property, in the nature of a fixture, for the purpose of insuring against a possible contingency, does not conclusively fix its character as personal property. *Studley* v. *Ann Arbor Savings Bank*. (March 23, 1897).

CHANCERY PRACTICE — SETTLEMENT WITH ONE DEFENDANT — ADVANCEMENT OF MONEY BY TESTATOR—TESTIMONY AS TO VALUE OF PROPERTY.—A settlement by complainant with one defendant under a decree determining an amount due from each of two defendants, would not estop the complainant from continuing his action against the other defendant.

2. It was error for the court to charge to a legatee the sum total of various sums given by the testator to the legatee from time to time, in the absence of any testimony tending to show that such amount was intended by the testator as an advancement.

3. An admission in the answer to the bill of complaint as to the value of certain property deeded to a legatee during the life time of the testator can not be construed as referring to its value at the time the answer was filed.

The amount fixed in the decree should be determined by the actual value of the premises rather than by the supposed cost of the land including the buildings.—*Carmichael* v. *Lathrop*. (April 6, 1897).

DOWER—STIPULATION—WAIVER OF DOWER.—In divorce proceedings the complainant agreed to accept a deed of certain premises and a certain amount in cash in lieu of all interest in the defendant's, her husband's estate, the stipulation further providing, that such payment and conveyance should be in full for all expenses and alimony, and it is held, that the agreement was sufficient to release the dower interest of the wife.—*McKelvey* v. *McKelvey*. (April 6, 1897).

FRAUD—EVIDENCE.—A bill filed to restrain the foreclosure of a mortgage on the ground that the signature of the wife of the mortgagor was obtained through fraud, will be dismissed and a decree of foreclosure entered, where it is made to appear, that not only is the alleged fraud a fabrication, but that the mortgagor and his wife are attempting to perpetrate a fraud upon the mortgagee.—*Dooley* v. *Dooley*. (April 6, 1897).

MANDAMUS—MANDAMUS TO COMPEL MUNICIPALITY TO MAKE CONTRACT—LACHES.—Mandamus will not lie to compel a municipality to enter into a contract for which bids have been requested and received, it appearing, that the contract has already been let to another party and the work partly performed.—*Clark* v. *Mayor of West Bay City*. (April 6, 1897).

MORTGAGE—INCLUSION OF TAXES PAID IN DECREE—FORECLOSURE UNDER CANADIAN LAWS—MARSHALLING SECURITIES.—In a proceeding instituted to foreclose a mortgage given to the mortgagee to secure him for any losses which might arise under a contract between the mortgagor and mortgagee, it is held:

1. The mortgage having provided for the payment of taxes and that they should be a lien, it was not error to include in the decree an amount so paid.
2. The contract having provided that the mortgage should include amounts paid for attorney fees and the services of the mortgagee, it was not error to include in the decree sums so paid.
3. The advertising of a mortgage with a notice of sale under the power of sale in Canada, does not result in vesting the title of the land in the mortgagee but in what is known as an abortive sale.
4. Where a creditor has a lien upon two funds, and there is a junior incumbrance having a lien upon only one of the funds, before the junior creditor can call upon the courts to order that the funds upon which he has no lien be first resorted to to extinguish the prior incumbrancer's debt, it must appear that the prior incumbrancer's rights will not thereby be prejudiced, and that he will not be put to loss and inconvenience thereby.—*Farwell* v. *Bigelow, et al.* (April 6, 1897).

## CURRENT LITERATURE.

The *Green Bag* for April contains a very interesting article by Charles E. Grinnell, Esq., of the Boston bar, entitled "Why Thomas Bram Was Found Guilty."

The article graphically narrates the history of the fateful voyage of the "Herbert Fuller," upon which vessel was enacted a most horrible tragedy. From the day of its departure from Boston about the middle of last June on an intended voyage to a South American port, to its return, a month later, at Halifax with the dead bodies of the captain, his wife, and second mate aboard, and finally the detailed account of the trial for their murder of Thomas Bram, his conviction and sentence to death, and in fact all the incidents bearing either directly or indirectly on this remarkable case, are related in such a splendid style and orderly arrangement of the events as to make an intensely interesting story of this terrible crime. The writer has taken occasion to give the whole crew a 'hauling over' in a descriptive way, moreover, and dispels a little of the oppressive gloom which enshrouds the tragedy, with a few happy comments on some of the rare bits of human nature which comprised the crew of the barkentine "Herbert Fuller."

The crime which occurred about two weeks after sailing from Boston, was of a most brutal nature. The evidence, both positive and circumstantial, shows beyond a doubt that the deed was committed by Bram. He despatched his victims with an axe, butchering their bodies in a most shocking manner.

Follow the detailed account of the incidents leading up to commission of the atrocious crime and of the subsequent events and occurrence to the close of the trial, one must inevitably accept the verdict which found Bram guilty, as the only logical conclusion to be drawn from the facts and circumstances which that jury had to consider.

As a very interesting story, we commend the article "Why Thomas Bram Was Found Guilty," but as a carefully prepared case review, covering as it does all the important features from first to last, with its very satisfactory explanation and reasons why the verdict found in that trial was a correct one, the story is still more deserving of praise.

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To American readers who have not ready access to the great bulk of the European periodical press, Continental as well as British, (and who has?) there is no magazine that can take the place of *The Living Age*. The whole world of literature is its field, and its readers get the best that the world offers. For the busy man and woman of this living age it is invaluable.

The publishers have purchased the serial rights to the publication of "In Kedar's Tents," by Henry Seton Merriman, author of "The Sowers." "In Kedar's Tents" is an attractive story of adventure in Spain during the Carlist war. It is said to be full of incident and to contain some clever sketches of character. Mr. Merriman's style is direct and forcible, and his humor is delightful. Readers who are weary of

the morbidly introspective in fiction will find this story refreshing.

Its quality abundantly sustains the reputation which Mr. Merriman's earlier stories have won for him in England and America. The first chapters of this work will appear in *The Living Age* of April 3, and continue through fifteen numbers.

The early April issues will contain some other papers of striking and timely interest. Among them, Mr. Gladstone's pamphlet on the Eastern question, which has so aroused the attention of the English people; Max Muller's Literary Recollections; Francis de Pressense on the Cretan Question; Leslie Stephen on Gibbon's Autobiography; and a reply by Sir Frederick Pollock to the article on the Hidden Dangers of Cycling which appeared in a March number of the magazine.

The first April issue being also the first number of a new volume, the 218th, and a new year, the 54th, offers an excellent opportunity for the beginning of a new subscription.

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An elaborate study of "The New Administration at Washington," by Albert Shaw, appears in the April *Review of Reviews*. Dr. Shaw draws an interesting comparison between the American and British administrative systems, pointing out the distinction between "ministry" and "cabinet," in both theory and practice; he also treats quite fully of Mr. McKinley's process of cabinet building, in various difficulties and adjustments, and outlines the noteworthy characteristics of the President's official family as finally selected, both individually and in *ensemble*. The article further defines "the larger executive group at Washington"—the various assistant secretaryships, and important bureau headships, and so far as possible the reader is informed as to the personnel and statutes of these important offices for the coming four years. Altogether, Dr. Shaw has made in this article an exceptionally useful contribution to current history. Two of the briefer articles discuss the question of direct employment of labor *vs.* the contract system on municipal works. Sylvester Baxter cites Boston's experience with direct work in various municipal departments to show the superiority of that method over the contract method, while Mr. George E. Hooker, of Hull House, Chicago, exposes the inadequacy of the contract system as applied to street cleaning in that city. President Thwing, of the Western Reserve University at Cleveland, writes on "How to Choose a College." His article deals with the practical questions likely to present themselves to students about to select a college home for four years, or to the parents of such students, and is characterized by the fulness of information and general breadth of view which have made President Thwing an expert on this and allied subjects for many years past.

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The April number of the *Atlantic Monthly* contains more than the usual quantity of purely literary matter, which always distinguishes it; and it has several articles also of timeliness and practical interest. The leading article is on "Dominant Forces in the West," by Frederick J. Turner, of Wisconsin, one of the most competent students of western civilization. He points out the origins of the people and their institutions and methods of thought, showing that the middle West holds the balance between the East and the far West. Mr. E. L. Godkin, this month, in his studies of Democracy in its practical aspects, shows the serious weakness of our irresponsible nominative methods. The break-down of the machinery for making nominations has defeated everything like really representative government. The gravest danger to our political institutions is found in this failure. Prof. George B. Adams of Yale sums up the "Anglo-Saxon Expansion" of the century and the world dominance of the race in an eloquent and comprehensive essay.

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The article of the Hon. David A. Wells (of his series on taxation) in the April number of *Appleton's Popular Science Monthly* is devoted to the question "How Can the Federal Government Best Raise Its Revenues? In it the author shows that a higher tariff will not be a true revenue measure, and proposes, instead of it, the taxation of a few special articles which he mentions, the burden of which will not be seriously felt, and which will yield within a small margin the amount of ad-

ditional revenue needed. Prof. William Z. Ripley's paper on the "Radical Geography of Europe" is devoted to the distribution of blondes and brunettes, the origin and nature of the difference between them, and the relation of these typical characteristics to long and short headedness, and is illustrated by maps. In "Reversions in Modern Industrial Life," Mr. Franklin Smith considers the trades-union organizations of the present time as a movement of return toward the gigantic and oppressive corporations of the middle ages. The discussion is to be continued. Prof. C. F. Hodge concludes his very interesting account of his experience—made upon puppies—on "The Physiology of Alcohol." His paper is finely illustrated. In Spencer and Darwin, Mr. Grant Allen defines the relations of those two great philosophers to the doctrine of evolution; of Spencer as the first formal promulgator of it, seven years before the publication of the Origin of Species; and of Darwin as having pointed out the method of evolution—through natural selection—and having furnished definite proofs and illustrations of it. Mr. A. F. B. Croften discusses "The Language of Crime." President Jordan's paper on "The Stability of Truth" is concluded. Interesting shorter articles are observations by M. Jassen, the French astronomer, respecting "Life on the Planets," and "Ants as the Guests of Planets," by Prof. M. Heim. A biographical sketch and portrait are given by Father Stephen J. Perry, the distinguished English Jesuit astronomer.

# MICHIGAN LAW JOURNAL.

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## *THE LEGAL ASPECT OF THE MAYBRICK CASE.**

Let me now call attention to Lord Salisbury's answer to the American petitioners—the only attempt that has hitherto been made to define the new charges, and supply the particulars that would be absolutely necessary in framing an indictment on them. She made the attempt relied on, he stated, when pretending to nurse her husband on his sick-bed. Now I think Lord Salisbury will have the honesty to admit that there was practically no evidence of any actual administration of arsenic while Mr. Maybrick was confined to his bed, and his wife was in attendance on him as a nurse. But it was contended that during this stage of his illness she made an unsuccessful attempt to give him some meat-juice, with which she had meddled and in which arsenic was subsequently detected. As regards this attempt, as already stated, the jury made no finding whatever. Their finding, such as it was, related to actual administration only. But we now learn from Lord Salisbury that this charge of actual administration is in fact abandoned, and that the English government places its whole reliance on an incident quite outside the finding of the jury.

Moreover, it will be seen that Lord Salisbury is not satisfied to rest this charge upon the evidence given at the trial only. He

*This is the continuation of the article in last month's number.

refers also to certain "facts known to Her Majesty's Secretary of State." These alleged facts have never been communicated to the prisoner nor her advocates, although they are relied on as proofs of a crime for which she had never been tried, much less has the public been informed of them, but so far as can be ascertained they are wholly unimportant.

As the charge of murder of which Mrs. Maybrick was convicted by the jury does not include the charges of administering and attempting to administer poison with intent to murder, on which the Home Secretary relied, so a conviction or acquittal on the former charge would not in any way exclude a trial by judge and jury on these latter charges. It need hardly be said that, even irrespective of evidence procured since the former trial, the defense against these new charges would assume a new aspect. New questions would be put to the witnesses, and new arguments addressed to the jury. The trial for murder did not in any respect fulfill the conditions of a fair trial on Mr. Matthews' charge of attempt to murder. As regards the meat-juice, for instance, the counsel for the defendant thought it sufficient to point out that, as Mr. Maybrick had taken none of it, it could not have conduced in any way towards the death which the prisoner was accused of having caused. The question whether anything took place which amounted in law to an attempt to administer meat-juice was not made the subject of cross-examination or argument, because it was not relevant to the issue before the jury; and a material item of evidence on the point, which had been given at an earlier stage, was not repeated at the trial. But the Home Office has persistently refused, not only to submit its new charges to the jury, but even to hold a public inquiry into them where the witnesses could be further questioned, and arguments arising on their testimony addressed by counsel to the Home Secretary or the presiding officer. If the charges in question are really distinct from the charge on which alone she was tried and convicted, she had never had even the faintest semblance of a fair trial for them. Indeed they have never been defined by such particulars of place, time, and circumstances as to inform her advocates of the points to which their argument sought to be directed. An admittedly wrongful conviction for one crime is kept alive for the sole purpose of enabling the Home Secretary to punish the prisoner, without any trial whatever, for totally different offences, without violating the letter of the law, but in complete violation of the spirit and intention of Magna Charta itself.

Finally, though the crimes charged against Mrs. Maybrick by the Home Secretary are punishable by penal servitude for life as the maximum penalty, I know of no instance in which any woman—not to say a lady in delicate health and a first offender—has been sentenced to penal servitude for life on a conviction for them. In a recent case where the attempt to murder consisted of poisoning, and the man's life was endangered, the poisoner (who had received some provocation) escaped with three years' penal servitude.

The severity of Mrs. Maybrick's sentence is in fact as unparalleled as the supersession of both judge and jury in passing it. Instead of being a necessary consequence of Mr. Matthews' finding, it is a most unusual one, though just within the limits of possibility. The principles of mercy have been violated almost as flagrantly as the principles of justice. A sentence of penal servitude for life is indeed often passed by the Home Secretary—in cases of infanticide, for instances—without any intention of enforcing it.

Many persons thought that this was so in Mrs. Maybrick's case and that she would have been liberated before the present juncture. And most probably this was the intention of Mr. Matthews at the time. But Sir M. W. Ridley has informed us that the sentence is to be rigorously enforced and that this was also the intention of Mr. Asquith. The sentence must, therefore, now be treated as meaning what it says. Was it a fair or a just sentence to pass behind the prisoner's back without hearing a word in defense or extenuation on undefined charges never submitted to any jury and which at most only rendered it possible as the extreme penalty in the statute book? Mr. Asquith was always merciless, but Sir M. W. Ridley's action in the matter is simply astounding. He literally seems to contemplate mercy for every one except the convict whom "the head of the criminal justiciary of England" has officially declared "to be entitled to an immediate release." He is neither a barrister nor a solicitor; but probably for that reason attaches undue weight to the opinions of his predecessor and his subordinates. A strong protest from the members of the legal profession at both sides of the Atlantic would perhaps open his eyes to the quagmire into which his adherence to officialism and routine has in this instance led him: but even if it were certain that such a protest would fail to procure life and liberty for this victim of Home Office mismanagement and obstinacy, it is imperativily required for the honor and dignity of the legal profession itself. What will posterity think of its members if they permit the intended judicial murder to be perpetrated, without once

raising the voices in the interests of justice and humanity?

While I think Mrs. Maybrick ought to have been liberated at once, that is not now the question. The questions that now arise, when we consider the case in its purely legal aspect are these:—1. Can we, after finding the crime of murder unproved, spell out of the verdict of the jury any minor crime punishable by penal servitude for life, and if so, was the sentence of penal servitude for life passed on this prisoner, for this minor crime, the distinct act of the judge, as the law requires, and not that of the Home Secretary? (With regard to all such minor offences the presiding judge exercises the widest discretion under the English system, but his sentence, if too several may be moderated by the Home Secretary, who cannot, however, increase it). 2nd. If so, can we, in consistency, reject the finding of the jury as to the crime of murder, while retaining it as to the minor crime in question? In other words, is this minor crime established by satisfactory independent evidence? 3rd. Is there in the evidence given at the trial such conclusive proofs of a minor offense punishable by penal servitude for life, and not included in the verdict of the jury, as to justify the Home Secretary in dealing with the charge himself, instead of submitting it to a second jury? And did he, in so dealing with it, without allowing the prisoner all reasonable facilities for defending herself against the new charge, both by evidence and argument? and did she receive the benefit of every reasonable doubt that could be raised in relation to it, as a second jury would have been bound to give her, if she had been tried upon such new charge, notwithstanding her previous conviction upon the charge of murder? 4th. Was the minor crime or crimes, thus conclusively proved, of such a nature as to make it certain that the presiding judge would, in the event of a conviction, have imposed the maximum sentence of penal servitude for life? and, if not, did the Home Secretary consult any, and what judges, as to the proper sentence to be imposed for such crime or crimes? Had Mrs. Maybrick been convicted by a jury of any crime not punishable by penal servitude for life, she would now be free. Had she been convicted by a jury of a crime punishable by penal servitude for life she would very probably be free also: for the sentence might not exceed ten years penal servitude and good conduct would in that case procure a release in somewhat less than seven.

Lastly, the ambiguous utterances of Mr. Asquith and Sir M. W. Ridley suggest another question: 5th. After the Home Secretary,

with the concurrence of the presiding judge and the premier, has declared that the crime of which the prisoner was convicted has not been proved beyond reasonable doubt, is a new Home Seeretary justified (without any new evidence against the prisoner, and in spite of any new evidence in her favor) in punishing the prisoner for the very crime which had been publicly declared to be unproved? Sir M. W. Ridley's language, though evasive, went far to show that he regarded the crime of murder as completely established. Otherwise, indeed, the strength of his declarations on the subject is inexplicable. If the only crime that was proved against the prisoner was one for which a life sentence went to the extreme limit of the law, and was almost unparalled in its severity, why should he declare that he had come "most emphatically" to the conclusion that it ought not to be interfered with? or why should he say that he had as little intention of releasing the prisoner as his immediate predecessor had, avoiding all reference to the Home Secretary, who originally passed the sentence, and who most probably *did* intend to modify it, like the similar sentences which he passed on unfortunate child-murderesses?

Prisoners of this kind usually receive a life-sentence from the Home Secretary and are set free in seven years at the utmost. It was generally thought that Mrs. Maybrick's sentence was of the same kind until Sir M. W. Ridley declared the contrary in the Home of Commons. But now that the life-sentence in her case is declared not to be a matter of precedent and routine, but one to be carried out to the full extent usual in such cases (for if an English "lifer" lives long enough he or she is ultimately released), we have a right to demand, what offence, punishable by penal servitude for life has been established with perfect conclusiveness? and if penal servitude for life is the maximum sentence for the crime in question, we have a right to ask further, why, and by what authority, has this extreme penalty been imposed? In England a jury is the proper tribunal to decide questions as to the prisoner's innocence or guilt in respect of any specified crime; and, except in the case of the conviction for murder, where the law compels the judge to pass sentence of death, the judge who presides at the trial is the proper person to fix the penalty. Is Mrs. Maybrick being punished for any crime of which she was convicted by a jury? Was her present sentence deliberately passed on her for that crime by the judge who presided at the trial? And, if so, did it exceed the legal penalty for the crime of which she was thus convicted?

NOTE.—The opinions of the eminent counsel to which reference

is made in the report of the committee which received the endorsement of the Medico-Legal Society are appended:

RE MRS. F. E. MAYBRICK.

"Having carefully considered the facts in the elaborate case submitted to us by Messrs. Lumley and Lumley, and the law applicable to the matter, we are clearly of the opinion that there is no mode by which in this case a new trial, or a *venire de novo*, can be obtained, nor can the prisoner be brought up on a *habeas corpus* with the view of retrying the issue of her innocence or guilt.

We say this notwithstanding the case of Regina v. Scaife (17 Q. B., 238; 5 Cox C. C., 243, and 2 Drew C. C., 281). We are of the opinion that in English criminal procedure there is no possibility of procuring a rehearing in the case of felony where a verdict has been found by a properly constituted jury upon an indictment which is correct in form. This rule is, in our opinion, absolute, unless circumstances have transpired and have been entered upon the record, which when there appearing, would invalidate the tribunal and reduce the trial to a nullity by reason of its not having been before a properly constituted tribunal. None of the matters proposed to be proved go this length.

"We think it right to add that there are many matters stated in the case, not merely with reference to the evidence at and the incidents of the trial but suggesting new facts which would be matters proper for the grave consideration of a court of criminal appeal if such a tribunal existed in this country.

(Signed) C. RUSSEL,
J. FLETCHER MOULTON,
HARRY BODKIN POLAND,
REGINALD J. SMITH."

"LINCOLN'S INN, 12 April, 1892."

RE MRS. F. E. MAYBRICK.

"I agree with my learned friends that the evidence at the trial, of this case did not justify the verdict, and I further think that this is a case where every possible means of procuring a rehearing should be resorted to; but I am unable at the present period of English law to assent to their proposition that in a case of felony, even if it is assumed that there is an innocent woman in an English prison, the rules of criminal procedure debar the courts from applying any

remedy unless some error making the trial itself a nullity can be shown to exist on the record; and I moreover feel that such an avowal, if made, should be made in the form of a judgment of the court and not in the form of an opinion of counsel.

"In reference to the questions put to us by Messrs. Lumley and Lumley in this care, I am of opinion that, assuming the facts of the case and irregularities of procedure, both by judge and jury, set forth in the instructions can be conclusively proved, the court should be invited *exdebito justitia* to set aside the verdict and order a new trial, especially as there is no recorded case of a refusal by the courts to grant a new trial in a case of felony. While, on the other hand, the case of Regina v. Scafie (17 Q. B., p. 258, and 18 Q. B., p. 773) stands unreversed, in which case the prisoners were convicted of felony at the assizes by a properly-constituted jury upon an indictment which was correct in form, and where, notwithstanding this, the Court of Queen's Bench, consisting of four judges sitting in banco ordered that the verdict be set aside and a new trial granted, and where the prisoners, having been again convicted at such new trial, underwent a fresh sentence of the law.

"I deem it therefore presumptuous in me, as counsel, to advise that any court would overrule that case, or would regard the rules of criminal procedure to be so inelastic as to compel the court, under such circumstances as those set forth in the instructions, to refuse to set aside the verdict and order a new trial, in Mrs. Maybrick's case, upon the bare ground that it is a case of felony.

"Having regard to the provisions of the Judicature Act, 1873, and the rules of the supreme court, I am of opinion that the high court has jurisdiction to entertain an application for a new trial of a case tried at the assizes, which are thereby constituted a court of the high court, inasmuch as there is now no necessity for having the case removed by *certiorari*, or otherwise, into the Queen's Bench previous to the making of such application. (See Regina v. Dudley, 14 Q. B. p. 280, and Mellor v. Royal Exchange Shipping Company, the *Times'* Reports, p. 663.)

"I am further of opinion that, in the event anticipated by my learned friends, of the court refusing to follow the precedent of the Scaife case, an application should be made to the court to follow the precedent of the Murphy case (L. R., 2 P. C., 535), where the record was allowed to be amended, and that the court should be asked on Mrs. Maybrick's behalf to direct that an entry of the conduct of the jury, and other irregularities mentioned in the in-

structions, be endorsed on the record, (See 2 Hale's Pleas of the Crown, 308, where Lord Hale says that an irregularity 'is to be, as it ought to be, endorsed on the record,') and that this application should be made for the purpose of putting such an error upon the record as would form a foundation for a writ of *venire de novo*.

"I am further of opinion that the advice given to the Queen by the Home Secretary as to exercising Her Majesty's prerogative on the ground that the evidence left a reasonable doubt whether his death was, in fact, caused by the administration of arsenic (which in this case is equivalent to a reasonable doubt whether murder had, in fact, been committed), and also the course taken in consequence of that advice, of applying to and obtaining from the court an order under the provisions of 5 George IV., cap. 82, directing that Mrs. Maybrick be kept in penal servitude for life are unconstitutional, and that her imprisonment is consequently illegal; and, therefore, that an application can be properly made for a writ of *habeas corpus* with a view to obtain her discharge on the ground that she is illegally detained.

"In reference to the special question put by Messrs. Lumley and Lumley thus: 'Does the evidence disclose any sufficient grounds for the statement made by the Home Secretary in his advice to the Queen—viz., the evidence leads clearly to the conclusion that the prisoner administered, and attempted to administer arsenic to her husband with intent to murder?' I can, after careful perusal of the evidence, find no sufficient ground for such a statement, which, is moreover, contradictory to the summing up of Mr. Justice Stephen, who pointed out (*e. g.*, p. 36). 'The theory is that there was poisoning by successive doses but I do not know that there was any effort made to point out the precise times at which such doses may have been administered.'

"A careful perusal of the evidence makes it clear to me that no such occasion of administration, or attempted administration, of arsenic by Mrs. Maybrick, whether with or without felonious intent, can be pointed out as would afford the Home Secretary any sufficient ground for the representation he made to the Queen; and further, that the only ground to be found in the entire proceedings for such a representation is what Mr. Justice Stephen described as 'the theory' of the prosecution as distinct from 'the evidence.'

(Signed) ALEXANDER W. MACDOUGALL."

"LINCOLN'S INN, April 12th, 1892."

Whatever may be thought or said by counsel of the views of Mr. MacDougall by those skilled in English criminal procedure, and concerning which his associates, do not seem to have assented, these opinions do show that this case would have been one in which an appeal would have resulted in a new trial in any state of the American Union and that "the certificate of reasonable doubt" required under American practice on an appeal in criminal procedure would have been granted by any impartial judge.

## *AMERICAN LAWYERS AND THEIR UNMAKING.*

PERCY L. EDWARDS.

I have seen somewhere a paper on lawyers and their making. It has occurred to me since reading that paper that in these present times one so disposed could easily find food for reflection in an inquiry into the status of the genus in America. The need for more lawyers was perhaps a pressing one in the time gone by. It is safe to say that that need has passed its flow period.

There was a time when the slow process of making lawyers, through the medium of the office and private instruction, left the ranks of the profession unfilled, and the few recruits ample room to display their knowledge or ignorance of the Blackstonian science. The advent of the law school has furnished ample relief to the aching necessity for more lawyers. Until now, in this year of our Lord, we are told that there are as many as 90,000 good, bad and indifferent lawyers practicing law in this country with its approximately 70 millions of people, and more coming from the schools and otherwise, faster than wheat out of a hopper. Ye Gods! Is this to be a modern form of plague?

And in all this crowd of attorneys, solicitors, counselors and what not, pushing and struggling for an existence in the ratio of 1 to about 800 of the population of this country, is there not shown much force of wit, sharpened to a point, perhaps, by some knowledge of the necessities of the future, in the reply of a Virginia student, who being asked "What is a fee simple?" answered, in good faith, it is said, "About two dollars and a half."

A word here about "school" education in the law, in America.

The foundation of this sort of legal preparation in this country was laid by that scholarly gentleman, Tapping Reeve, well known to lawyers to-day as the author of that excellent book Reeves Domestic Relations. He established the school, which afterwards became famous as the learning place of many able lawyers, at Littlefield

Hill, Mass., in 1783. The Hon. James Gould, author of Gould's Pleadings was a lecturer in this school. These two good men, together with Jabez Huntington, ran the school on the hill, for half a century. In 1813 the attendance was fifty. Gould and Reeve lectured the students, Huntington did the quizzing. The lectures were taken rown by the students in full and were then transcribed into what became five large volumes.

Then Isaac Royal, a Massachussetts man, but a lawyer of a pronounced pattern, not liking the way things were mixed up in the battle of Lexington, went to England and died there. If this were all there would not be anything remarkable about the passing of Isaac Royal. But he did a remarkable thing in endowing a chair of law in Harvard College by granting to that institution of learning the title to 2000 acres of land in Bay state. Then was founded, perhaps, the greatest of America's great law schools. The attendance at first was not calculated to add largely to the ranks of the profession. But when Joseph Story became connected with the Harvard law school its prosperity was assured.

Yale college followed in 1826. The university of Virginia about the same year. Then came the Albany law school, 1851—since merged into Union college. University of Pennsylvania, Columbia college, and Michigan university under the guidance of the able jurist Thomas M. Cooley, followed soon after.

Then came an era of law school building until, according to a report made at the meeting of the American bar association last year, there had been founded 85 schools of law in the United States, with an attendance near to 10,000 students. The large increase in attendance at these schools has occurred since 1870. In that year the schools reported 1611 students; in 1886, 3054; in 1891, 6106; in 1894 over 7600.

Thus it will be seen what the schools are doing to make the man or woman a lawyer so far as the conferring of a degree is concerned. That these same schools are doing a good work in better equipping men and women for the work of the profession, is not doubted. Although it needed not these schools to make a Marshall, a Patrick Henry, Jay, Hamilton, Aaron Burr, Governor Morris, Oliver Ellsworth, Roger Sherman, nor a Samuel Adams.

The early lawyer had a hard time of it in this country and his descendant of to-day seems to be destined to experience adversity, but of a somewhat different character than the former's experience.

While Lord Mansfield, at Westminster, was anathematizing the

political heresy of the colonists, there were coming into prominence those willing and capable of defending their rights. Patrick Henry won his reputation in his fight against the hated clergy in Virginia. And somewhat later came the profound Marshall, in some respects the greatest of all American lawyers.

Together with the bible, Blackstone's Commentaries were the books commanding the most attention among the colonists at this time. There is evidence that in the early days preceding the revolution, there circulated among the colonists 2500 copies of Blackstone, in which the chapters on the rights of the people, were, presumably, the most read.

These early lawyers met with no kind reception at the hands of the prejudiced and bewitched settlers of the new world. They were degraded, fined, pilloried, and whipped, and it was prophesied of them that "In another century the law will possess in the north what now the church possesses in Peru and Mexico." But not withstanding the abuse and opposition of the clergy of the established order and the prejudiced pilgrims, the lawyer of even colonial times continued to live and beget a posterity in this country.

And this begetting system has gone on to the present time, only under improved methods, more akin to the patent inductive methods employed in the hatching of chickens, until we have seen we approximate so near to 100,000 in our population of say 70 millions, while in France with a population of about 40 millions has only 6000 lawyers and something less than 2500 officials who assist in the lawyers' work. Germany has a population of over 45 millions and only 7000 lawyers. These figures would give a ratio for this country of 1 to less than 900; in France, 1 to less than 5000; and in Germany, 1 to about 6500.

It has been said that this marvelous preponderance of lawyers in our land is the result of the law of supply and demand.

It is not, in my opinion. There can be no legitimate demand for such a disproportionate ratio of professional to laymen. And more plainly does this appear when we come to consider the fact that the sources of revenue to law offices, in this country, have been, one by one, cut off, until but little remains now except court work. Does the busy urban lawyer, representative of one or more great corporate interests, understand the force of this assertion. That while his hours are filled with the care of a vast corporate interest, whose pay keeps him fat and slick, and indifferent to humanity, a thousand of his brothers are not so fortunate. And it is necessity

which forces American lawyers to go into other pursuits as an aid in helping out a meagre income from the legitimate practice of the law. So that Mr. Bryce has declared that many American lawyers "are practically just as much business men as lawyers."

If Mr. Bryce intended no sarcastically critical allusion here, then he hit upon an interesting subject for reflection. That many lawyers, now a days, are engaged in pursuits not strictly professional, is per force of necessity. There is nothing left to the practitioner, outside of a formal few, but to turn to some congenial occupation to help out his exchequer. Since the banking institutions of the country have engaged in the semi-professional occupation of collecting claims, rents and loaning money, and taking securities, they have cut deep into the profits of the law offices as they were twenty-five or thirty years ago. Then, again, the business of a conveyancer, which at one time was inseparable to a law office, is now no longer the necessary adjunct which it was. Each of the hundred and one petty officials which the laws of our country provide for, are engaged in this branch of the business of an office for the sort of a "fee simple" which ran in the mind of the Virginia student before referred to.

It is safe to say that, approximately, fifty per cent. of the ordinary revenues of the old time law office have, in this manner, been cut off and lost forever to the profession. Is it any wonder then that Mr. Bryce finds lawyers engaging themselves in occupations non-professional, or semi-professional? There will be more of it in the future, or I miss my calculation, to use a slang phrase. Lawyers being "made in a day" and finding no demand for their services are apt to become cheap, if not disreputable, and to avoid this condemnation, many follow branches of business not positively non-professional, perhaps, but such as will produce more income.

The field of politics, in this country, has relieved the gorged condition of the profession, to a great extent, within the past twenty-five years, and has kept the numbers thereof from preying upon each other. The lawyer in America, and perhaps the world over, takes to politics as a duck to water. His education and practice as an expounder of the law render him as it were "to the manor born." Politics has proved a veritable maelstrom into which some really good lawyers have been caught and ruined professionally. Again, out of the churn of politics have come lawyers of note who would have remained in obscurity in their profession had it not been for the push which prominence in the political arena gave them.

Lawyers framed the constitution of the United States. There were fifty-five members of the constitutional convention which framed the supreme law of our land. Thirty of these were lawyers. Of the twenty-five presidents of this republic, twenty are more or less known as lawyers, and eighteen of the vice-presidents belonged to the same profession. President McKinley and Mr. Hobart are both lawyers.

A large proportion of the cabinet officers of this country have been lawyers. Some of them came from obscurity in the profession into prominence by this fortunate circumstance. Out of 1157 governors of states, according to the authority of J. H. Benton, Esq., of the Boston bar, in figures given in the year 1894, five hundred and seventy-eight in 978, whose occupations were learned, were lawyers. That up to the same year of the 3122 senators who had been seated, 2068 were lawyers. Among the representatives who have sat in congress up to 1894, 5832 out of 11,889 were enrolled as lawyers. That, at times, as high as seventy-one per cent. of both houses of the national congress have been lawyers.

Add to this the many places in the classified civil service of the United States, filled by the appointment of lawyers, in the 85,000 places all told, and one can easily see where to look for the many lawyers in this country.

Now there are about 208 lawyers of the gentler sex practicing under the protecting folds of the "star spangled banner." As, at present, they can not, to any remarkable extent, anyway, manipulate a caucus, or hold up a "pull" on the boss of the ward. They must be left to the tender mercies of him who "tempers the storm to the shorn lamb," or they must take their knitting into court.

In the Dominion of Canada where women have been lately permitted to apply for admission to the bar, the rule established requires that the woman barrister, when she appears in court, shall appear in black dress under black gown, touched off with white collar and cuffs, and bareheaded, and, presumably, they are not permitted to bring their knitting into the sacred precinct set apart for her majesty's Q. C.'s The writer has, many times, listened to the clicking of the knitting pins under the nose of the judge of a circuit court in the states.

As England has been dubbed a nation of shopkeepers, so may America become known a nation of lawyers.

As an evidence of the crowded condition of our profession look at the work being done by the class that turns to law writing and

compiling. This thing has become so common in this country, in these latter days of the century, that the law writers are in danger of developing into a mere class of scribblers, notwithstanding the efforts of the good Dr. Bishop to confine the disease. The production of text-books, encyclopedic works, digests, works on practice, reports, etc,, with the eternal revision, amplification and repetition, together with the rehabilitation of works which should have rested in the well-earned peacefulness of the past, have made the path of the practitioner of to-day as difficult to follow as was that of Bunyan's hero. It is amazing and appalling this flood of legal products which has overflowed its natural and reasonable limits, to the no small inconvenience, to say the least, of the unwary practitioner. What a difference between the times of Marshall, Reeve and Gould and the present. Then less than a score of books were considered to well equip a lawyer for practice, where a thousand is now used.

In this respect at least, perhaps, lawyers are more upon a plane of equality, and the lawyer of brains but no money, is as fortunate as the lawyer of money but no brains.

It seems as though the multiplying of law books is epidemic in character and grows out of the multiplying process of those who use them.

We are perfectly familiar with the stories told of Daniel Webster and his rise in the profession; how his ability and eloquence won him success, and how suitors stood at the entrance of the court and as he passed out gathered about him to engage his services in their behalf. But even then this did not occur soon enough in his career to enable him to avoid unpleasantness with his butcher and others to whom he owed various amounts. Daniel Webster was an exceptionally able man—as eloquent as Robert Ingersoll. But the times have changed. Ability is more common, although now and then some superbly equipped man of physique and brains will rise, God like, above his fellows and command their admiration.

But outside in the busy whirl and rush of human affairs to-day, the well-earned success of a lawyer in court may pass unnoticed. No expectant client awaits him at the door to offer him homage, in the shape of a fat retainer. He considers himself fortunate if he gets paid for what he has done. His well earned victory is a mere incident of to-day; to-morrow it will be forgotten.

There are so many offers, now adays, that it is little wonder if

the clients do not meet us with open pockets at the doors.

And yet if you "blot from American history the lawyer and all that he has done and you will rob it of more than half its glory. Remove from our society to-day the lawyer, with the work that he does, and you will leave that society as dry and shifting as the sands that sweep over Sahara."

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## *NOTES.*

The New York City Bar Association, at a recent meeting, adopted a most commendable amendment to its by-laws. The language of the provision, which was adopted by a practically unanimous vote, is as follows: "The executive committee shall from time to time appoint a member of the association to be the attorney of the grievance committee, whose duty it shall be to investigate, when his attention shall be called thereto, any matter touching the administration of justice, upon which the committee is by this by-law authorized to act, and all cases (1) of misconduct of a member of the association in his relation to the association or in his profession, (2) of alleged fraud or unprofessional conduct on the part of any member of the bar of this state * * *, (3) of persons pretending to be attorneys or counselors at law, but not regularly licensed and admitted to practice." The importance of this step cannot be overestimated. To retain an attorney, on salary, whose duty it shall be to investigate, and, if deemed advisable, to formulate charges and prosecute them before the committee, in all matters of unprofessional conduct, and other abuses against the legal profession, is the only practical method of accomplishing the all-important functions for which bar associations exist. If this idea was endorsed by the lawyers' clubs and associations generally, the moral tone of the profession would be greatly elevated.

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In the case of Conrad Pfeiffer v. Board of Education of Detroit, Judge Carpenter filed an opinion, May 8th, granting to petitioner a mandamus against the respondent. The case will probably be appealed.

The opinion recites the fact of the case and discusses the law

in a very forceful manner. The following is an abstract of the opinion.

Conrad Pfeiffer, a resident tax-payer of Detroit, and father of Louis Pfeiffer, a thirteen year old school-boy, applied for a mandamus to compel the respondent to discontinue in the public schools the use of a book entitled "Readings from the Bible." The only question is whether the action of the respondent in introducing this book in the public schools is forbidden by the constitution of Michigan. The constitutional provision touching the matter is as follows:

Article 4, Section 39.—"The legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or compel any person to attend, erect or support, any place of religious worship, or to pay titles, taxes or other rates for the support of any minister of the gospel or teacher of religion."

Section 40.—"No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose."

Section 41.—"The legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion."

The most significant provisions of these sections for this case is that prohibiting the enactment of laws to compel a person to pay titles, taxes or other rates for the support of a teacher of religion and that embodied in section 41. These provisions are conclusive. Ordinary constitutional provisions respecting fundamental rights have a prior history which throws much light upon their construction. These provisions never appeared in constitutional or statutory law until they appeared in the Michigan constitution of 1835, and there, not under the title "Legislative Department," but under that of "Bill of Rights."

Constitutional provisions should be given their natural and ordinary meaning. Do these prohibit respondent from taking the action sought to be restrained? Respondent contends that the provisions in question should not be construed in such a manner and says the ordinance creating the north-west territory, requiring "religion, morality and knowledge being essential to good government and the happiness of mankind, schools and the means of education should forever be encouraged," and that the right given in that ordinance to form a state government when it should have 60,000 inhabitants, "provided the constitution and government so to be formed shall be *republican and in conformity with the principles contained in these articles*," not only permits but encourages the teaching of religion in the schools. Carried to its legitimate limits, this argument is not sound. Moreover it is not contended that the ordinance could not have been set aside by the constitution, but it is argued that it was not so set aside. It is argued that the constitu-

tion shall be construed so as to compel the public schools to teach religion. If these schools receive support from taxes, then the constitution compels the payment of taxes for the support of one who teaches the christian religion. But this the constitution in express terms denies. As a matter of fact the book "Readings from the Bible" is a book teaching religion. The constitution prohibits all religious teachings in the public school or it prohibits none. The provision against compelling a person to pay taxes for the support of a teacher of religion either forbids the proposed use of "Readings from the Bible," or it forbids nothing. It seems to me clear that such teacher is a teacher of religion towards whose support persons are compelled to pay taxes and, therefore, the constitution in explicit language forbids such proposed use. It seems to me equally clear that the action of the respondent is in violation of the provisions of the constitution that the legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion. The respondent by its action, gives to those who accept as true the religious teachings of King James' version of the bible the right of having their children taught a portion of those teachings at the expense of those who do not accept them as true. Does this not enlarge the civil rights and privileges of those who believe and diminish those of persons who hold other beliefs? It is clear that the legislature cannot tax those who do not accept as true the religion of the bible for the purpose of teaching the bible to those who do not accept it.

Our constitutional provisions respecting religious liberty mean precisely what they declare. They forbid any legisiative authority compelling a person to pay taxes for the support of a teacher of religion or diminishing or enlarging the civil rights of any person on account of his religious belief.

Respondent's proposed use of "Readings from the Bible" in the public schools is in direct conflict with these constitutional provisions, and relator, whose constitutional rights are thereby violated has a right of redress.

It is interesting to note how much adverse criticism Judge Carpenter's decision in this matter has occasioned, but it might be suggested that had those reverend gentlemen, et al., have given the question a little more careful thought, they would possibly have been less bitter in their personal remarks. In our opinion, it is difficult to see how, under the law and the facts of this case, a sensible judge could have come to any other conclusion.

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Within the past month, attention has been called to two very contrary methods of dealing with a certain class of offenders. In both instances, the offense was of the same nature, contempt of court; both were committed in the state of New York, but there was a vast

difference in the treatment of the two culprits.

Now, in the first case, a certain individual had been indiscreet, and for chastising a boy, judgment had been rendered against him in the sum of $1000.00. But not having an over-abundance of this world's goods, he succeeded in getting what money he possessed, removed from the bank before the attorney for the plaintiff was able to get it. The court, however, commanded the defendant to disclose the whereabouts of the money, or go to jail until such time as he should do so. The defendant chose the latter course, went to jail, and there remained a prisoner for two years or more. Now, we do not wish to be understood to criticise such punishment, for the laws must be obeyed, and so must the orders of our courts. This man's fault was his too exalted esteem of his hard earned savings; but the records show that he received the reward of his wickedness without a murmur.

The other instance to which I refer, however, was one in which the court's order was disobeyed on other grounds than those of finances, mens' honor was at stake, the fair names of United States senators were threatened with disgrace. This disobedient witness, a gentleman by the way, refused to disclose the names of certain individuals concerned in some of those peculiarly, or perhaps better, pecuniarily, irregular transactions of the sugar trust.

Now, of course, nobody would blame this gentleman, nor doubt his motives for one moment, in fact it was his duty as a gentleman to remain silent under the circumstances. But, as in the first instance, he was disobeying the commands of the court; and his offense was just as great, in the eye of the law, as though he were refusing to disclose the hiding place of his money, and from the moral point of view, a thousand times worse. We congratulate the unfortunate gentleman, however, on the leniency which was shown him. His punishment consists of confinement in prison for a term of thirty days. It is said that he has been given a very pleasant suite of "cells," one for his sleeping apartments and another for an office. Everything is tastily arranged, with lace curtains, Persian rugs, elegant furniture, a special bill of fare, and in fact everything, tending to make his surroundings "home-like" and "comfortable" is furnished by his thoughtful friends.

What a pity, as an editor of one of our daily papers happily remarked, that "class A criminals cannot send substitutes." This suggestion, amusing as it may seem, would possibly tend to a more uniform system of treatment to prisoners, for then the prison officials would not have to be forever studying the whims of his richer class of boarders, but could treat them all alike and on a common footing. Until such discriminations, as above illustrated, are dispensed with, however, let's not speak seriously of "even-handed justice."

## LEGAL MISCELLANY.

The Atlantic Constitution says: "While in Washington, in February, 1861, and waiting to be inaugurated President, a friend who entertained a bitter contempt for President Buchanan asked Mr. Lincoln if he intended on inauguration day to ride to the capitol in company with the retiring President, or whether he would go alone. 'That reminde me,' answered Mr. Lincoln, 'of what a man in Illinois, who had been summoned as a witness in a law suit. Having the appearance of a Quaker, he was asked when he arose to take the oath if he would swear or affirm. "I don't care a d—d which," was the reply.' "

Lawyer—I am afraid I can't do much for you. They seem to have conclusive evidence that you committed the burglary.

Client—Can't you object to the evidence as immaterial and irrelevant ?—*Tid-Bits*.

After twenty-five days of session, at an expense of $1,000 per day, the Kentucky legislature has succeeded in passing a law punishing those who throw overripe eggs and other missiles at public speakers. This is the only bill that has been passed, and while it may be a very good law, $25,000 is a trifle expensive for it.—*Chicago Law Journal.*

Judge Floyd Estill, of the circuit court, created a sensation when court convened by calling in the grand jury and instructing them to indict the court for drunkenness if they had sufficient cause before them to do so.

"Mr. Foreman, I understand you have in your possession information that the judge of this court was intoxicated at the last term of court. If such is a fact it is your duty to indict the judge of this court for drunkenness," said Judge Estill.

"I have heard it said," falteringly reported Foreman Morgan, "that you were drunk at that time."

"Then Mr. Foreman," said the court, "I instruct you to indict this court for drunkenness if there is sufficient evidence before you."

"I did not know," said the foreman, "that the jury has a right to indict the court."

"I charge you," said Estill, in threatening manner, "to retire and at once report your finding in open court."

Judge Estill is one of the most prominent Tennessee jurists and the affair has created a big sensation all over the state. When court adjourned the jury had not returned.—*Detroit Evening News.*

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In an action for breach of promise the fair plaintiff's attorney proposed to read to the jury the proposal of marriage, which happened to have been written on an ordinary telegraph blank. When he started to read he began with the words, "My dear Louise." The counsel for defendant interrupted him and said, "If it please the court, this is an instrument partly printed, and partly in writing; by all the rules that were ever held by the courts, if the party offers part of that instrument he must read it all, he can't read part of that and not it all." The lady's attorney protested that the fact that the matter had been written on a telegraph blank was a mere accident only, and that the printed matter on the telegraph blank had nothing to do with the case; but the plaintiff's counsel insisted on having it read and was sustained by the court. Thereupon very reluctantly the gentleman began to read at the top of the message, "There is no liability on account of this message unless the same is repeated, and then only on condition that the claim is made within thirty days in writing." And then after the signature of "Yours lovingly, John," he was compelled still more reluctantly to read "N. B.—Read carefully the conditions at the top."—*The Barrister.*

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When some of the European critics of America and things American made the charge that capital crimes are more common in this country than in any other claiming to be civilized, patriotic defenders of our land were quick to resent the charge with much indignation, and more anger. Unfortunately our critics are in the right, and our friends are mistaken. The charge is only too true. Dr. Paul Bartholow, of New York, in a recent paper treating the subject from a scientific point of view, shows incidentally that murder is more common in the United States than in any other country with which reasonable comparisons can be made. Dr. Bartholow is not discussing the matter to make out a case, one way or the other; he is merely considering it from a physician's point of view, without heat, without prejudice, and with no purpose to serve but to ascertain facts, and to judge of their significance.

In collecting his facts Dr. Bartholow makes some remarkable statements that cannot fail to command anxious attention. When

he quietly informs us, in the course of his summary, "that in the United States there are every year thirty-four murders to one in India," he is only making statistical comparisons; but the effect of such a showing on the minds of thinking people must be as shocking as the exhibit is amazing. In the same unimpassioned, but all the more forcible fashion, the scientist shows that the rate of homicides is one-fourth higher here than it is in Italy, twice as high as it is in Spain, five times higher than in Austria, nine times higher than in France, and nearly twenty times higher than in England, Scotland or Germany. This exhibit is surprising and frightfully discouraging. It shows a state of affairs existing here far more dreadful than any foreign observer has ventured to guess at. And there is no chance of dispute about the matter, either. Dr. Bartholow simply collects and collates the testimony, not to create a sensation, but to get at the truth; and the truth is terrible, indeed.

Bad as his exhibit is, however, it is not the worst that the merciless logic of the doctor's figures presents. The crime of murder, awfully common as it now is, becomes more and more common with each passing year. The comparisons above made are horrifying, indeed, but they will be more and more horrifying as time goes on. The annual increase of assassination is the most frightful factor of all these grewsome calculations, and one which cannot be contemplated without serious alarm. The statistics tell us that there were 1,808 homicides reported in the United States in 1885. In 1890 there were 4,290. In 1894 they had mounted up to 9,800—more than doubling in four years. In 1895 10,500 lives were offered up; the greatest of crimes multiplying six times over in ten years. Here is an exhibit that must give us pause. It compels us to stop and think. It should further induce us to consider what is to be done about it.—*Chicago Legal News.*

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The Jefferson circuit court decided against Sallie Omberg, who sued the United States Mutual association for a $5,000 accident policy on the life of her husband.

It developed that the man died as the result of a mosquito bite, and the lower court held that this was not an "accident" in the meaning used by insurance companies.

The court of appeals has, in an opinion by Judge Hazelrigg, reversed the lower court and gives peremptory instructions for a judgment for Mrs. Omberg for $5,000, holding that the mosquito bite was an accident.—*Frankfort (Ky.) Journal.*

## RECENT MICHIGAN DECISIONS.

ACTION TO RECOVER COMMISSION ON SALE OF REAL ESTATE—ORAL CONVERSATION—QUESTION FOR JURY—EVIDENCE AS TO NEGOTIATIONS BY AGENT WITH SUBSEQUENT PURCHASER.—The language employed by parties in an oral conversation is to be construed by the jury, and if it is susceptible of a construction which indicates that the minds of the parties met upon an understanding of agreement, it would be error for the court to withdraw such testimony from the jury.

In an action brought by a land broker to recover a certain commission agreed to be paid for finding a purchaser, it was contended by the defendant that inasmuch as the sale was made not to the firm with whom plaintiff was negotiating, but to a member of the firm, the plaintiff could not recover; and it is held, that it was for the jury to determine whether the negotiations which plaintiff had with the firm, including conversations had with the member of the firm to whom the sale was made, were a moving cause in affecting the sale.—*Brooks* v. *Leathers*. (April 27, 1897).

CHATTEL MORTGAGE—ASSIGNMENT OF CLAIM—ADMISSION OF ENTRY BY THIRD PERSON.—A chattel mortgage covering a stock of goods and accounts and providing that until default be made or proceedings taken to foreclose, the mortgagor would have the right to possess, use and sell the mortgaged property in the regular course of business, would not deprive the mortgagor of the right to sue for and collect claims in his own name.

Entries made by a third person, can not be introduced to prove facts regarding which it is shown that he had no personal knowledge at the time the entries were made.—*Swan* v. *Thurman*. (April 27, 1897).

CONTRACT—NEGLIGENT REMOVAL OF GRAVEL FROM LAND—MEASURE OF DAMAGES—JUSTICE OF THE PEACE AS COUNSEL.—Defendants agreed to pay a certain sum for gravel on lots belonging to plaintiff, and to refill the lots and restore them to a certain level. Plaintiff sued to recover the value of the gravel, and for damages resulting from the alleged negligent removal of the same; and it is held, that the proper measure of damages would be, not the value of the depreciated value of the property, if any, but the value of the amount of the material it would take to restore the lots to a level: and further, that the pleadings were sufficiently specific to allow a recovery for the cost of leveling the lots.

The fact that a case was tried before one justice of the peace of the city of Grand Rapids would not prohibit another justice, who had a separate court and separate docket, from engaging as counsel in the case.—*Grady* v. *Sullivan, et al.* (April 27, 1897).

CONTRACT—TERM "SURFACE RIGHTS"—EXECUTION OF CONTRACT BY AGENT—AUTHORITY.—The term "surface rights" has no legally defined meaning, and has no such generally well understood meaning as to enable a court to determine specifically what it includes.

The authority of an agent acting for the vendor in the sale of lands must be in writing and where the agent deviates from his written authority the contract is void.—*Keweenaw Association (Limited)* v. *Friedrich, et al.*) April 27, 1897.

CORPORATION LAW—ANNUAL REPORT—LIABILITY OF DIRECTORS UPON FAILURE TO FILE REPORT—EFFECT OF AMENDMENT OF 1895.—Proof of the failure of a corporation to file an annual report as required by section 12, of Act No. 232 of the Public Acts of 1885, raises a presumption that the neglect was intentional and therefore willful.

The liability of the directors under the statute extends not only to those debts contracted prior to the default, but also to all debts contracted thereafter.

2.—The amendment of the law of 1885 by the statute of 1895, simply changed the period within which the reports are to be filed and did not repeal the former law, so as to cut off the right of action.—*Bank of Saginaw* v. *Pierson.* (April 27, 1897).

CRIMINAL LAW—MOTION FOR NEW TRIAL—LACHES.—Section 9576, Howell's Statute providing that a motion for a new trial in criminal cases, must be made at the same term, or at the next term thereafter, can not be enlarged in its operation and where three full terms have passed between the date of the conviction and the date of the motion, the remedy must be held to be barred by lapse of time.

The jurisdiction of the court can not be saved by the entry of several motions made extending the time, no reason appearing why the motion might not have been made and disposed of within the statutory time and it failing to appear that the orders were granted with the consent of the prosecuting attorney.—*Fraser* v. *Chapin.* [April 27, 1897].

EVIDENCE—BILL OF PARTICULARS—DOCUMENTARY EVIDENCE—CHARGE TO JURY.—In an action to recover an amount due on a printing bill defendant denied any personal liability. Plaintiffs filed a bill of particulars, and were allowed, on the trial, to show that after the work was done defendant looked over their books containing the items embraced in the bill of particulars, and agreed upon how much was due, and that the defendant agreed to pay it.

Held: that the admission of this testimony was not error.

It was not error to admit in evidence certain pages of plaintiffs' books of account, the witness having testified that he made the entries, that they were the original entries as taken from the order book, and he knew they were correct.

In view of the evidence it was not error for the court to refuse to charge the jury that, as a matter of law, all testimony tending to show a settlement between the parties to the suit, could not be considered by them, as it was not in conformity with the plaintiffs' bill of particulars.—*Baxter et. al.*, v. *Reynolds.* [April 27 ,1897].

INJUNCTION—JURISDICTION OF COURT TO GRANT.—Application of Henry A. Krolik and others for mandamus to compel Norman W. Haire, acting Wayne circuit judge, to vacate an order.—*Krolik et al.*, v .*Haire, Acting Wayne Circuit Judge.* [April 27, 1897].

JURISDICTION—JUDGMENT—COLLATERAL ATTACK.—Where an acceptance of service has been held sufficient to confer jurisdiction upon the court, a judgment rendered thereon cannot be attacked collaterally.—*Allured* v. *Voller.* [April 27, 1897].

LANDLORD AND TENANT—LEASE—ACTION FOR USE AND OCCUPATION.—An action for use and occupation will not lie where a contract relation exists of landlord and tenant, by virtue of which an obligation exists to pay rent.—*Hirschfield, et al.* v. *Franks.* (April 27, 1897).

LAND CONTRACT—LACHES—ESTOPPEL.—Where a party who may be entitled to repudiate a contract because the other party refuse to execute any essential or substantial part of his agreement, does any act which amounts to an admission of the contract or a ratification of it, after a full knowledge of all the facts and circumstances connected with it, he cannot afterwards elect to treat it as void and rescind it.

A vendee under a land contract having agreed to abide by a second survey of the land providing it showed as much land as a prior survey, it was not inequitable to require him to make payment on the basis of the first survey, the second survey having shown even more land than the first.—*Bennett* v. *Hickey, et. al.* [April 27, 1897.]

MORTGAGE—INTRODUCTION OF PAROL EVIDENCE TO IDENTIFY FUTURE ADVANCE—PARTIAL PAYMENT BY MORTGAGOR—RELEASE—REMOVAL OF BUILDINGS FROM MORTGAGED PREMISES.—Parol evidence is admissible to identify future advances intended to be secured by a mortgage. Though a mortgage on its face is for the payment of a specific sum of money, parol evidence is admissible to show that it was really in-

tended to secure future advances made from time to time.

A partial payment of a mortgage debt under an agreement to release the mortgagor from all personal liability, held not sufficient to release him from his debt, nor to release the lien created by the mortgage.

A lien created by a mortgage upon buildings attached to the free-hold in such a way as to make them part of the real estate cannot be defeated by removing the building to another piece of real estate.—*Johnson, et al.* v. *Bratton, et al.* (April 27, 1897).

PAYMENT OF LIQUOR TAX BY NOTE—ADVANCEMENT BY COUNTY TREASURER—RELEASE OF PARTNER BY ACT OF CO-PARTNER IN EXCESS OF PARTNERSHIP AUTHORITY—BILL OF EXCEPTIONS.—A promissory note given to a county treasurer in part payment of a liquor tax will not be held void on the ground that the transaction was against public policy, it appearing, that the treasurer made the loan out of his private funds and paid the full amount to the county.

A member of a firm engaged in the sale of liquor, and who also personally conducted a separate saloon, was intrusted by hispartner, with funds to pay the partnership tax. Instead of so doing, he executed a note to the county treasurer for $600 and paid $400 in cash receiving two tax receipts, and it is held, that having exceeded his partnership authority, his partner could not be held liable on the note.

A certificate attached by the trial court to a bill of exceptions, held sufficient to establish that the testimony was set forth in full in the record.—*Hatch, et al.* v. *Reid.* (April 27, 1897).

PRINCIPAL AND AGENT—PAYMENT BY CHECK TO AGENT—FRAUDULENT WITHDRAWAL OF FUNDS BY PRINCIPAL.—A creditor who has received by his agent a check in full payment of a judgment secured by him will be estopped from enforcing the judgment, it appearing that the funds which the judgment debtor had placed in the bank to meet the check had been withdrawn by the creditor upon a previously dishonored check; and it further appearing that he acted upon information furnished him by the agent.—*Kallander, et al.* v. *Neidhold, et al.* (April 27, 1897).

PROBATE LAW—REPORT OF COMMISSIONERS FINAL WHEN NOT APPEALED FROM.—When commissioners have acted officially, and made their report to Probate Court, and no appeal is taken, it is final and binding upon the parties interested.—*Finley* v. *Dubay et al.* (April 27, 1897).

PROMMISSORY NOTE—STATUTE OF LIMITATIONS—SEC. 1580 HOW. STAT. CONSTRUED—LIABILITY OF INDORSER.—Where a promissory note is made payable so many days from date, the statute of limitations begins to run from the day of payment, and not from the day of date; but the day of maturity is excluded in the computation. If payable at sight, the statute runs from sight. If the instrument be payable on demand, the statute begins to run immediarely. "On demand after date" is the same as "on demand."

The facts of which a person must have knowledge, under Sec. 1580, How. Stat., in order to give a note efficacy against him, as if payable to bearer, are simply that the note is payable to the order of the maker or a fictitious person.

A third person indorsing a note at the time of its execution and before delivery is a maker jointly with the drawer of the note.—*Peninsular Savings Bank* v. *Hosie, et al.* (April 27, 1897).

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## *SOME OBSERVATIONS ON THE JURY SYSTEM.*

HON. GEO. GARTNER.

Without entering upon the question as to the history and reasons which led to the system now and for many years in vogue of the trial of actions at law by a jury, the origin of which is obscure and largely speculative, it may be stated that it has long been established, that it is within and is solely the province of the jury to determine all the alleged disputed facts in a controversy. The theory is based upon the idea that the judgment and finding of the twelve men who compose the jury, selected by reason of their impartiality and disinterestedness, should be adopted without question and followed and accepted by the courts. The office of a jury is therefore not perfunctory, for their determination as to what constitute and are the facts, is final and conclusive, and from such finding there is no appeal.

Alleged facts become established by proof. Proof in law is termed evidence, that which convinces the mind, and not only convinces, but, which produces conviction and leads one to say the fact is so and so. In a jury trial, it is the conviction—the finding and the determination of twelve men that the jury system requires and a jury trial contemplates. This has been and is regarded as the safest and the surest method of determining the facts in a controversy and the arriving at the truth. With all the faults and objections—and there are many—which may have been urged against the

jury system, no superior or safer method to take its place, or a method even approximating to it, has ever been advanced or suggested.

In theory, in simplicity, in producing generally satisfactory results, results which appeal most strongly to impartial judgment, it challenges the ingenuity of man to evolve not only a more perfect and better, but as well an equal system. Many of the evils, faults and objections oft-times urged against it—not always without cause—are not due to the system, but arise only by reason of the system; and, which, while so arising, furnish opportunities which in the carrying out, make its application in some instances objectionable. These are the matters deserving of condemnation and not the system itself. The system when regarded from the standpoint of the manner of its application, carried out in practice as in theory intended, may possibly be subject in some particulars to criticism, but, the faults suggested and objections oft-times urged are largely, if not entirely, chimerical. It is the most perfect and the most satisfactory system that the human mind has devised or even conceived.

Law, theoretically, is said to be perfect reason—the logic of the human mind. Its application to facts established is the office of a jury and of the jury system; and the nearer the approach to the original theory intended—if not the ideal—the more perfect becomes our jurisprudence. Any innovation upon the real theory of the jury system should be viewed and regarded with disfavor, if not with actual condemnation. The nearer the approach to the ideal, the more just, more equitable and perfect will become the administration of, and the enforcement of the generally recognized precepts governing human society and human rights.

The history of the development and progress made in the jury system is both instructive and interesting. To illustrate my object and the purposes of this paper, it becomes necessary to call attention to a few facts.

In 1544, Sir Nicholas Throckmorton was prosecuted on the charge of high treason. The trial was had before a commission and a jury, and resulted in a verdict of acquittal. The court being dissatisfied with the verdict, committed the jury to prison, from which they obtained their release after some months of confinement, some on the acknowledgment that they "had offended," and others on the payment of fines which left them practically paupers. And it was not until 1670 that it became established that a jury could return a verdict according to their own consciences without being subject to

penal consequences. The instances are by no means rare, where juries were subjected to both fines and also imprisonment for returning verdicts contrary to the wishes and desires of the judges.

The manner of the treatment of jurors by the courts has undergone many very radical changes. In early history jurors were not only deprived and denied the actual necessaries of life, not mentioning ordinary comforts which were unknown, but were obliged to submit not only to actual confinement while in the discharge of their supposed duties as jurors but made to endure hardships to an extent not even imposed on imprisoned convicts; and in England, under their jurisprudence, it was not until as late as 1870 that jurors were allowed, when out of court, a fire and refreshments, to be provided, however, at their own expense.

The theory of a jury trial as now understood, has been of gradual and of slow development, the evolution of years if not of centuries. In its infancy and for centuries thereafter, a jury was practically a useless and an unnecessary adjunct in the trial of a cause. Absolute and even servile submission to the opinions, wishes and desires of the judges was not only characteristic of their actions, but regarded by them as a matter of course, and often actually enforced by the judges. Independent action was entirely out of question, and their verdicts thus forced, were frequently adopted by the judges, and by them made an excuse for many of their outrageous and inhuman, if not criminal acts.

Traces of these ideas and these sentiments are still observable and entirely too patent, this being especially true of the English courts. The Maybrick case—which since the trial and for some years has been the subject of considerable discussion and extended consideration—may be cited as an illustration, where the judge in charging the jury the first day discussed the law and on the second day reviewed the testimony, and as a matter of fact argued the case and impressed upon the jury his ideas and his judgment, thereby influencing them to an extent that independent and impartial action, and the exercise of an unbiased judgment by the jury, became entirely out of question. While this may be an extreme case, it does not require a keen observer to at once discern the application of this idea and this sentiment in jury trials in English and Canadian courts in both criminal and civil cases. That this is contrary and antagonistic to the real theory of a jury trial is certain, and that it invades and encroaches upon, if it does not in a measure destroy the principle, the most important

principle, if not the only function intended to be exercised by a jury, must be true to a greater or less extent, and this must be the conclusion of every one who has given the subject even the most superficial thought or examination. While this practice prevails—where a judge is permitted to influence a jury and in a measure control their findings of the facts—a jury trial is not what it should be, nor what it is intended to be. This practice has no excuse, and logically can be justified only on the basis of an abolition of the jury system.

In American courts the real theory of the jury system meets with much more favor. The lines as to the duty of the judge, and that of the jury, are more strictly drawn, and not only applied but also enforced. The real theory as is intended, is carried out in a more practical application, but whether to the extent that it should be is doubtful. That it may be improved upon is certain. While a judge is not prohibited or debarred from, to a certain extent, elaborating upon and discussing the testimony in a case, it is certainly unwise and is frequently discouraged. The instances are numerous where courts of review have set aside verdicts by reason of the actions of judges who in their charges to juries, discussed the testimony, giving undue prominence to one side or the other; and it has become established that no verdict will stand where the charge of the judge is shown to be argumentative. This rule which now may be regarded as to the settled law in American courts, inculcates the idea and brings us nearer the theory of a real jury trial as intended, which is as said, that it is for the jury and for them solely, to determine the facts, uninfluenced by any act, expression or intimation on the part of the judge presiding.

It has been frequently observed and not without some reason, that there are more miscarriages of justice due to the actions of judges than can ever be attributed to the action of juries; and this is true even when we take into account the venality and corruption, often with good reason charged against juries.

The jury is frequently made the scape-goat to bear the faults and shortcomings of the bench. The proverbial uncertainty of the law, the due appreciation and application of legal principles, the lack of comprehension due to fortuitous mental and legal incapacity, the failure in applying common sense, learning, intelligence and logic in the administration of the law, thereby giving it force and vitality, and breathing within it a sense of righteousness and justice, and thus commanding respect and admiration of the law and its application, the failure of acts promulgated to give expression to ideas,

and their reasoning food for thought, the necessity of explanation and excuses, the occasion as well as the necessity of the critic on the one hand and the apologist on the other—are all matters often charged to juries and for all of which the bench is responsible.

The character of man is judged, and his thoughts and actions are in no small sense dependent upon his surroundings. Jurors are impressed, and their thoughts, ideas and notions are largely moulded by their environments. Whether they are led to appreciate the importance of their functions, impressed with the gravity and responsibility of their office, the necessity of the exercise of honest judgment and of careful thought, all in a large sense are dependent upon impressions created, originating with and promulgated, although it may be imperceptibly, by the bench. These are all matters which if overlooked, and not applied, rest with the bench and cannot be ascribed to the jury system.

Regarded as a whole, a jury as now constituted exhibits what may be termed a miscellaneous body of men, cosmopolitan in character, who differ not only in vocation but as well in disposition, thoughts, ideas, manner of thinking, reasoning, learning and experience. Thus combining as it does all classes of men and all grades of intelligence is what makes and constitutes the real merit of our present jury system.

The great question, what is the truth, or what is the fact, depending for a finding and solution upon testimony, or to use a more simple expression upon the statements of witnesses, is as apt if not more so, to be correctly found and determined by a jury so composed as by one made up of educated and polished men. To do, to say and to determine and conclude what is right and what is just, does not require the action of men of the highest intelligence. Ordinary intelligence in men, combined with impartiality and honesty of purpose in their actions, is the most likely to produce correct conclusions, because technical niceties would be by them disregarded and as a matter of fact not considered. Take a case where complicated questions arise in the finding of facts and submit it to a jury composed of men of experience in the law, either twelve lawyers or even twelve judges, and the chances of their arriving at a unanimous conclusion would be exceedingly small. Submit it to men of ordinary intelligence, men conversant with the ordinary affairs of life, honest and possessing ordinary common sense, who fail to see or comprehend fine-spun theories or hair-splitting propositions, and the result they will arrive at is apt to be correct.

Most if not all of those who condemn the jury system, either never had or never heard tried a jury case, or perhaps, if they had, were as they think unjustly defeated. But little reliance can be placed upon the judgment of such persons, it really being absolutely worthless.

Looking back over by no means a small experience at the bar, in the trial of civil and criminal cases of most every description, the prosecution of several years of criminal cases, and, the experience for six years on the circuit bench in the trial of a large variety of cases, I must say that the occasions are exceedingly rare, and only exceptional where the verdict of a jury did not meet with the approval of my own mind. Though at times, and while reason may have been influenced by intense interest, a verdict in some instances may not have been what I had anticipated; still, after cool and calculating thought upon the subject, the objections first entertained became mollified, if not entirely overcome and such verdict approved. Let any lawyer of experience in jury trials disconnect the law as presented to the jury by the judges, and consider the finding of their verdict upon the facts as determined by them and in the light in which the case as to the law was presented, and then judge of their findings, he will find the instances extremely rare where he will have just cause to complain.

It should be the object and the purpose of every judge on the bench and of every member of the bar to see to it that the function and province of the jury be left to them and not in any way intered with, to leave to them the determination of what the facts are, to be arrived at by them in their own manner and in their own way, entirely uninfluenced by any intimation, word, action or expression from the bench. When this course shall have become adopted and followed, a jury trial will be what in theory it has always been intended to be.

# PERTINENT REMARKS TO YOUNG LAWYERS.

HON. D. CADY HERRICK.

In a recent address to the graduating class of the Albany Law School, Judge Herrick, of the supreme court of New York, gave the young lawyers some splendid advice and many valuable suggestions pertaining to their chosen profession. He spoke as follows:

Gentlemen of the Graduating Class:—

I congratulate you that you have advanced successfully so far in your efforts to enter into an ancient and honorable order. If you have honestly and earnestly pursued your studies thus far you should have no great difficulty in passing the examination which will permit you to enter upon the practice of your chosen profession.

There are no elaborate ceremonies to herald your entrance to to the bar, no addresses made, no advice given, so that perhaps it may not be amiss here, upon the threshold of your professional life, to make a few suggestions and offer a little friendly advice.

If your aim in life is merely the accumulation of money, or to escape laborious effort and toil in your way through life, stop right where you are. There are few callings or pursuits where the same ability, industry and perseverance will not yield greater pecuniary returns than the bar. Better start in life as a day laborer than to enter the profession merely for what is to be gained from it in dollars and cents. While some accumulate large fortunes, yet, compared to the total number of practitioners, they are few and far between. But to those who desire to make their way in the world by purely intellectual effort, who enjoy the conflict of mind with mind, and who can, without shrinking, look forward to years of unremitting mental toil and labor, not ceasing with the going down of the sun, nor measured by any eight-hour statute, who are content to receive moderate pecuniary returns, there is no profession like that of the bar. Like all callings, it can be and is prostituted and abus-

ed, but none can be more honorable and useful. And the man who endeavors to make his professional career an honorable and useful one, even though, through lack of ability or from mischance, he misses reaching its higher walks, will obtain an honorable standing among his fellow-men and enjoy the respect and confidence of the community in which he lives, rewards more to be desired than wealth without them.

Moderate abilities,coupled with great industry and absolute integrity, will insure you a moderate competence, and even open to you great opportunities for public trusts and honors. To the man of superior abilities great possibilities are opened.

I will assume, however, that you have determined upon your career, have passed your final examinations, and been licensed to practice. Do not think your time for study has ended, and that you have only to wait for business, and do not be discouraged because clients do not flock to your office. Some one has said that it is one of the merciful dispensations of a Divine Providence that a young lawyer's clients are few and far between, in order to give him time to learn something about his profession.

While waiting for clients to come is the time for earnest thought and study. It is the period in your life for "moderate living and high thinking." It is the time to lay broad and deep the foundations of your professional career; it is the time of waiting; the opportunities it affords to of law. It will be time enough to study cares when your clients come. Make the most of this time of waiting; the opportunities it affords to equip yourself for the higher branches of the profession, and its great responsibilities will never come back to you.

Do not make the mistake of thinking that it will be time enough to equip yourself when the case comes and the occasion arises for the use of your knowledge. It has frequently happened that the case and the opportunity has been presented to a lawyer to establish his reputation upon a firm foundation, but from lack of a broad knowledge of his profession he has failed to realize its possibilities, and his chance has gone, never to return.

To carry on this work you must have books. Most of you will enter the office of some lawyer to whose library you will have access, but do not depend entirely upon that; begin early the creation of your own library; put all the money you can scrape together into books. Buy few text books, and let them be of the standard authors, upon the leading subjects, and the last editions.

Commence early the collection of reports. Buy those of your own state first.

Senator Matthew Carpenter, one of the great lawyers of the last generation, in an address to the graduating class of the Washington Law School, advised them to get Barbour's reports; to buy, beg, borrow or steal them, but by whatever means, to get them; that they were a library in themselves; that in them they would find ingeniously reasoned decisions upon every side of every question, and that no matter upon what side of a question they were employed, they would find in Barbour's Reports a decision to support their contention.

I am not prepared to say that there are not other reports of this state that deserve the same commendation for the same reasons.

Do not, in your efforts to fit yourself for your future career, confine yourself merely to the law; the lawyer whose knowledge is confined solely to that to be found between the covers of law books is only partially fitted for his profession. He may become a sharp, keen, acute practitioner, but always a narrow one; he may know the letter of the law, he will not fully realize its spirit; and upon large questions will fail to meet the demands made upon him. There is no branch of knowledge that comes amiss to the lawyer.

Everything that concerns the affairs of men sooner or later touches the law, and needs the lawyer.

Of course, it is not to be expected to you will master all branches of knowledge, or all professions. The human mind is not adequate to such a task; and when you get a case that requires special scientific or professional knowledge, you can secure the assistance of a specialist, but it may well be that without any general knowledge of a subject you will not appreciate that it enters your case, or realize that you need the assistance of a person learned in that particular branch of knowledge until it is too late.

Let the creation of your law library go hand in hand with that of a general library.

But in your study of books do not become a recluse. The study of men is of just as much importance as the study of books.

Learn to know them and their pursuits, and all the phase of human nature. Acquire a knowledge of business and of public matters. The successful lawyer must, in these days, be a man of affairs.

The all-around lawyer must not only be a warrior to fight his clients' battles, he must also be an adviser, a negotiator, and a diplomat.

The preparation, trial and argument of cases is but a portion of a lawyer's business. He must be prepared to advise in business affairs, to negotiate the settlement of controversies. The reputable and skillful lawyer does not promote, but composes, contentions.

Some of our greatest and most prosperous lawyers seldom or never appear in court. Great legal victories are frequently won, not in court, but in the office, where diplomacy and skill in handling men and measures preserve reputations, save families from disruption, keep great business houses from wreck and ruin, harmonize conflicting and contending interests, and make possible the combinations of men and capital necessary to carry forward the great commercial enterprises of the age.

These things require not only legal learning and ability, but a knowledge of men and affairs, and frequently a fineness as delicate as the touch of a woman.

It is lawyers possessing these qualifications that are sought by the great corporate and business interests of the country.

Those interests are generally in the hands of men of high honor of ability; when they require legal assistance they want the best. They possess the intelligence to understand and appreciate ability in others, and they are willing to pay for it. The result is that our best legal talent is rapidly drifting into the almost exclusive employment of the great corporate and commercial interests of the country.

I have advised you to acquire a knowledge of public affairs. I mean something more than merely reading about them. Take an active part, so that you will acquire a practical knowledge.

First, because good citizenship demands it. Every citizen owes some service to the state.

The better trained and educated a man is, the higher that duty becomes, and the more valuable the service he can render.

In this country the man who does not take an interest in public affairs is not a good citizen, and is not fit for public service either upon the bench or elsewhere. The more intelligent and active an interest he takes, and the more vigorous and robust a personality he becomes, the better fitted he is for high positions of public trust and honor.

Second—Take a part in public affairs for your own benefit. It enlarges your ideas; it makes you a broader man. It gives you a new and larger conception of law and the statutes.

It will give you a greater knowledge of men and of the springs of human action, which will be invaluable, particularly in the trial and

argument of cases.

It will also greatly enlarge your acquaintance from which to draw business.

But be careful, very careful, not to become too much absorbed in politics; it is a seductive pursuit, and its pleasures and enjoyments continue to allure long after other amusements have become stale and flat, and unless held firmly in hand it is well calculated to wreck your professional career. The law is a jealous mistress, and will not permit devotion to any other shrine.

Still, public service and high legal standing are not incompatible.

Almost every chief justice and lord chancellor of England, and most of the judges of the first class in this country, have taken an active part in public affairs before their elevation to the bench, and such participation has only the better qualified them for their high duties, and rarely, very rarely, has partisanship swayed their rulings.

Lawyers stood in the forefront of every struggle for English liberty, and in our own country, from Adams and Otis to Lincoln, have been leaders in every battle for human rights, and are still rendering valuable, voluntary, unbought service to the state and nation.

While, therefore, as good citizens, as well as for your own advancement, I advise you to take an active part in public affairs, do not do so for the sake of obtaining office.

Take no office except strictly in the line of your profession, unless under very exceptional circumstances. Except to escape starvation, do not seek for or accept any political clerkship. Do not be a seeker for political business. If it comes to you voluntarily, is honorable, and the compensation fair, well and good; but do not seek it. In doing so other and more lasting clientage is lost; you become more and more dependent upon it, and I know of no more contemptible figure in the profession than the legal political bone hunter.

But let us return to our studies. While fitting yourself for your professional career, do not fail to qualify yourself to present casesto courts and juries. Of course, much of that ability comes only from practice and experience, but much also can be acquired by previous thought and preparation.

It has always been a matter of surprise to me that in the two professions, the law and ministry, where the ability to present their views in the strongest possible manner is of such great importance,

so little attention is apparently given to the art of public speaking. There is an impression, I know, with many people, that oratory has ceased to be effective. This, I think, is a mistake. The style of oratory which is effective has perhaps changed; the people are better read and more intelligent, and it requires greater knowledge and skill to convince or move them, but clear and persuasive oratory is just as effective as ever.

It has been said "that the orator is born, not made," and while you may not have that heaven-born fire and genius, still much may be done by study and practice to make you a powerful and persuasive speaker.

Study to be clear in your statements of law and fact, and bear in mind always that you cannot make a clear statement unless you have a clear and perfect understanding of the matter yourself. Make your statements in clear, precise, simple English; use small words when possible.

In arguments before courts, when you have made a perfectly plain, full and clear statement of the facts, your case is more than half argued.

Avoid all mannerisms and affectations. Speak easily and naturally. The highest art is to conceal the art you are employing.

Speak as if you were dead in earnest, and meant and believed every word you said. In the vast majority of cases there is no occasion for splendid rhetoric or declamatory display; indeed, they would be out of place.

The advocate who wins the verdicts is the one who makes himself the thirteenth juror, and in plain, earnest, Anglo-Saxon, with no apparent arts of oratory, satisfies the remaining twelve that his side is the right side.

This art was perhaps possessed in the greatest perfection by Scarlet, afterwards Lord Abinger, one of the most effective jury lawyers ever known at the English bar. He was a contemporary of Lord Brougham, who had a world wide reputation as a great orator and advocate. This story is related of them: An English farmer, who had been attending a circuit, in speaking of the trials that had there taken place and the lawyers engaged, said: "Brougham is the man for my money; he is a great orator, an eloquent man, and if I ever get into trouble he is the lawyer that I want." "But," said one of those present, "I see that you decided against Brougham in all the cases he was in, and in favor of Scarlet." "Oh," said he, "that is all right. Scarlet is a nice man, and he chanced to get on

the right side in all those cases, and we had to decide with him." Scarlet had made himself the thirteenth juror.

If you expect to become trial lawyers, or to argue your own cases, you must assiduously cultivate this art of public speaking. It is absolutely necessary in those branches of the profession.

It is surprising how few really good trial lawyers we have. I do not speak of first-class trial lawyers, because men of the first class are few and far between in every profession, calling or business; but the moderately good trial lawyer is rare, and there is hardly a bar in the state but what has room for one or more lawyers who can present cases to courts and juries with ability and skill.

I have not the time to give you my ideas as to what constitutes a good trial lawyer, or as to how you should study and practice to make yourself one; I can only say, do not despise the day of small things. Take hold of the smallest cases that are brought to you, and exercise all your skill and arts upon them. Do not refrain from going into the lower courts; make them your training schools. The old country justices' courts were the training schools for the greatest trial lawyers and advocates this country has ever known.

Prepare your cases thoroughly. Make yourself master of all the facts and the law in your case, so that you know more about it than any other human being. Thorough preparation upon both the law and facts is one of the greatest secrets of success.

In preparing upon the law, either to advise your client or for your brief for the court, strive to be intellectually honest—honest with yourself. By that I mean, do not permit your desire to assist your client or your case warp your judgment as to principles or color your opinion as to what a case has really decided. Strive to find out what the law really is, not what it is the interest of your client to have it—that is the only way to become a safe adviser.

In starting out in your professional career, be careful and guarded in your conduct towards your brethren in the profession. Do not acquire the reputation of being a sharp practitioner. Let your simple word be as good as your oath or written stipulation; do not depend upon tricks to overreach or obtain advantage of your adversary. Be sharp, keen and acute to detect and prevent impositions upon you or your client; but do not depend too much upon mere sharpness or keenness to advance your own causes.

Be absolutely candid with the court; do not attempt to mislead it. Remember you are one of the officers of the court whose duty it is to assist it in ascertaining the truth; it has a right to rely upon

you, and will until you prove untrustworthy.

The lawyer who is not candid with the court, who attempts to deceive or mislead it, soon becomes a marked man. He may continue to be treated pleasantly and courteously, perhaps with that extreme courtesy that sometimes marks the lack of cordiality, but his every word and act is watched and scrutinized; nothing is taken upon trust; and while his client is not consciously permitted to suffer, yet his services have become practically valueless to that client.

While it is the duty of the courts to mete out justice irrespective of persons, that applies more particularly to the causes and the clients, and not to the counsel. It is natural that the man of great learning and industry, who understands and thoroughly prepares his cases, who is honest and candid with the court, should have, and deservedly have, great weight with it. Ability and high character are entitled to and will receive, corresponding weight and consideration in whatever forum they appear.

The man who gains the reputation of being sharp and tricky seldom advances to any high position in the profession, but spends his days as he begins his professional career, to use the words of Sheridan, "picking up small fees and impudence," and never reaches the higher grades of the profession and the accompanying emoluments and honors.

In all your acts and dealing so conduct yourselves that you will not be ashamed to have any of them exposed to the full blaze of public scrutiny and criticism.

The profession is much misunderstood, and from time immemorial the lawyer has been the subject of ridicule and abuse, and it is, therefore, so much the more important that not only in his professional life, but in his daily walk and conduct, he should so conduct himself as not to give just occasion for reproach.

No matter how upright he may be, he cannot escape calumny, but he can avoid just cause for it, and sooner or later the community will recognize the rectitude of his life.

Never commence an action unless you think your client ought of right to succeed. In the defense of an action a different course is permissible, and so long as you do not pervert or suppress testimony, you can properly assist your client in procuring the opinion of the court or jury as to his rights and duties, and not usurp their functions yourself. Every man has a right to his day in court, and the right of counsel to present his side of the controversy.

Never lend yourself to any scheme for making money out of any person's lapses from virtue or morality. The only place for the lawyer who assists the blackmailer is to share with him the felon's cell.

While it is the custom of the ignorant and thoughtless to malign and abuse the profession, yet the very persons who do so do not hesitate, when in trouble or difficulty, to fly to some member of the profession which has been the subject of their abuse, and confide their troubles to him, unfold to him the innermost secrets of their lives, and place fame, good name, fortune, and even life itself, in his hands, feeling and believing that the trust will not be betrayed, and that the fidelity of the lawyer thus employed can be absolutely relied upon.

There is no class of men, either professional or otherwise, that have so many, vast and varied interests committed to their fidelity, and where so few betray the trust.

I hope that it is unnecessary to impress upon you the duty of absolute fidelity to your clients.

Lord Brougham, upon the trial of Queen Caroline, made this declaration as to the duty of an advocate to his client:

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among others, to himself, is his first and only duty; and in performing this duty he must not regard an alarm, the torments, the destruction which he may bring upon others.

"Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

I think it is the consensus of professional opinion that Lord Brougham, in the heat of conflict and in his desire to let it be known that the defense was not to be intimidated by the king, went too far.

The means and expedients resorted to to save your client must be neither dishonest nor dishonorable; neither must you sacrifice the innocent to save your client or your cause, and your duty as a patriot is superior to your duty as an advocate. With these limitations, it seems to me the definition I have quoted as to the duty of an advocate may be accepted, with this addition, that under no circumstances are you to reveal the confidences of your client without his consent. They are his secrets, not yours; and should be re-

garded as sacred as the revelations at the confessional.

This obligation exists not only while the relation of counsel and client continues, but after it ceases, and is to be carried inviolate to your grave.

These suggestions, trite and commonplace, to the old lawyer, I trust may be of some little use to you, in calling attention to what you may usefully employ yourself about in the waiting years of your professional life, and also your obligations and duties from the beginning to the end of your career.

In closing, let me say, enter upon your professional career as you should upon the trial of a cause. Having, after careful thought and preparation, determined upon your course, enter it not timidly or half-heartedly, but cautiously and prudently, firmly and fearlessly and if you do not achieve success, you will, at least, deserve it.

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## *NOTES.*

At this particular season of the year, when the colleges and institutions of learning throughout the country are turning adrift their innumerable hosts of graduates, perhaps it would be quite fitting and proper to welcome with kindly and encouraging words, those who have determined to cast their fortunes and lend their reinforcements to the ranks of the legal profession.

There has been much said as to the law profession being overcrowded. This is one of the discouragements which is ever being hurled at the young lawyer; and the most discomforting part of the suggestion, is its sublime truth. Yet there is some consolation to be derived from the fact that the same condition, if not in the same degree, is, nevertheless, true of all other professions and occupations of life.

Then, too, in no other business or profession, does success mean quite so much as it does in the law. What though the competition be greater! We are being constantly reminded, that "there is always room at the top." Conceding that, in the law profession, the climbing is more difficult, and that the "top" is much too small for the accommodation and, by far, too inaccessible for all of the many pilgrims who undertake the journey to its goal; yet we may always toil along with the knowledge that nothing is worthy of the name of success, which is not gained by hard struggle and constant self-sacrifice. The obstacles and difficulties which the young lawyer is forced to confront in order to attain success, are seemingly endless and impossible of surmounting; and yet, when attained, who will say that the reward, so dearly sought and so courageously won, is not worth all the effort that it cost.

It is this great graduating class of to-day, that furnishes our profession with its brilliant and able leaders of to-morrow. Therefore, with all due respect, we congratulate you who are just entering upon a life's work in the profession which, at least, can offer the

greatest possibilities, even though its probabilities are small and apparently remote; and, in extending the welcoming hand, we sincerely wish you all success.

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It affords us great pleasure to learn of the appointment of James H. Brewster, a member of the Detroit bar, as professor of law in the University of Michigan.

Although one of the younger practitioners, he has succeeded in building up for himself a splendid and lucrative practice.

As a professor of law, Mr. Brewster is possessed with a special fitness; for not only has he had the practical experience as a lawyer, but he has enjoyed the advantages of a thorough college education, is possessed of those qualities which make up a student; and, moreover, he is a gentleman of high moral principal, and of a genial disposition, which will win for him the respect and confidence of all. Mr. Brewster's appointment to this important position was a most pleasing one, and we feel that he is the right man in the right place.

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On Thursday evening, June 24th, the Detroit College of Law celebrated its fifth annual commencement exercises by graduating a class of thirty-eight young lawyers. This is the largest class that has yet graduated from this new, though rapidly growing institution.

The present enrollment of the college shows a marked increase over past years; and, with its newly acquired advantages, including an extension of the course of instruction to three years, by which the scope of its work is materially broadened and enlarged, and its methods greatly improved, with its ample facilities for the combining of practical experience with the theoretical training, there can be no reason to doubt but that the Detroit College of Law will rapidly attain for itself recognition among the best law schools of the country.

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Do we want Hawaii? The treaty by which on assuming debts aggregating $4,000,000 we shall enter upon the possession of the Sandwich Islands is under consideration in the United States senate. The proposed treaty is a document of seven short articles. Article I cedes rights of sovereignty in Hawaii to the United States, and makes it a territory. Article II vests the public lands of Hawaii in the United States, and on their sale the proceeds are to be used by the inhabitants of the islands for educational and other public purposes. Article III gives the president of the United States power to appoint public officers in Hawaii until Congress shall otherwise provide. All treaties now in force cease and determine. Article IV provides that the public debt of Hawaii to the maximum amount of $4,000,000 shall be assumed by the United States. Article V provides that no further immigration of Chinese will be permitted, and

those already in Hawaii cannot go to any other portion of the United States. Article VI arranges that five commissioners shall be appointed to recommend legislation. Article VII provided for the ratification of the treaty. Our nominal policy has been in opposition to the acquisition of new territory, but our history fails to show conformity to our ideals; as witness, the Louisiana purchase, the Alaska purchase, the Mexican robbery and the annexation of Texas. We really want, too, the island of Cuba, as this latter really should be a part of us from our intimate, geographical and mercantile interests. If the acquisition of Hawaii is a prelude to that of Cuba, we want the former, if it is to be considered as an act from which no example will be urged in the other case, we don't want it. It would mean much to us, but will cost much, too much, when we consider that in time of war that detached territory would have to be kept at all hazards.

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Since the last national event occurred in which the sporting fraternity was so deeply concerned, namely: the Corbett-Fitzsimmons fight, throughout many of our states matters less entertaining but really more important have passed into history. Many state legislatures have met and adjourned, many bills in the aggregate have been presented to the various legislatures, and among them some which undertook to legislate against the exhibition of the great fight by means of the kinetescope, biograph and other similar devices and inventions. Do you remember how the papers soon after the big fight had ended, began to state that the photograps of the fight were a failure, and the pictures could not be reproduced in a realistic fashion? Now, this was given out early in the time of the meeting of the legislatures. What was the object of this misrepresentation? It could only be to avoid adverse legislation on this subject. You cannot kill a *dead* duck. These pictures *could* not be reproduced, and so the legislators did not legislate that they should not be. I have heard it stated that there is a law out west that "A man need not use common sense unless he has it." We of the middle states never pass such laws. These reproductions of the fight meant many thousands to their owner, but the owner did not believe in bribing legislatures, and so he took a surer way. The originator of this scheme would make a good politician.

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The MICHIGAN LAW JOURNAL some time ago published an unsigned article from the pen of one of our best known Detroit attorneys questioning the constitutionality of the law permitting judges of one circuit to hold court in another. This article was answered by one from the pen of Robert T. Speed. There was considerable discussion of the subject at the time, and now from the decision of the supreme court in a late case the latters views are apparently supported.

## *LEGAL MISCELLANY.*

Trial judges should take note of the case of Smith v. Sherwood in which the supreme court of Wisconsin has very properly decided that the absence of the judge from the court room for a considerable time, during the arguments to the jury, without the consent of the parties, is reversible error. It appears that the counsel improved the time during the judge's absence to indulge in numerous acrimonious discussions. Objections were made to some of the statements made by the counsel who was addressing the jury, and in one instance, at least, the judge was sent for to rule upon the objection, which being done, he returned to the adjoining room. It was claimed by the respondent that all such objections were taken down by the reporter, and are contained in the bill of exceptions, but it was claimed by the appellants that objections were made upon which there was no ruling. Of course, the trial judge could not certify to what took place during his absence from the room, and he did not attempt to do so; nor did he state whether he was within hearing, nor whether his absence was with consent of counsel, as claimed by respondent, or not. Herein, says the supreme court, is the vice of the matter. The bill of exceptions is expected to tell the complete story of the trial, from start to finish, and to tell it with absolute correctness. When the trial judge is absent, there is in reality no person or officer who can certify to the appellate court as to what took place during that absence. That court is, and must always remain, in doubt as to the matter; no satisfactory conclusion can be reached from the affidavits of opposing counsel; and thus this period remains a *hiatus* in the case. The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. During such an absence grave errors or abuses of privileges may occur, and the appellate court may be left to the conflicting affidavits of overzealous attorneys or parties in interest to determine what in fact took place. It avails not to say that error must be affirmatively shown. This is true; but, where the trial court has disabled itself from informing the appellate court as to what occurred, how is error to be shown save by affidavit? "We cannot," concludes the Wisconsin court, "but regard

this long absence from the bench during an important part of the trial as an error which calls for a new trial. We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way to dangerous abuses, and break down one of the most valuable safegards to litigants."—*Central Law Journal.*

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The primitive common law cared little for nerves. It dismissed nervous sufferings contemptuously as sentimental. But one of the best qualities of the common law is its power of adjusting itself to the changing conditions of the social environment. In divorce, for instance, the conception of cruelty is no longer confined to bodily injury or reasonable apprehension thereof. It concludes conduct endangering a wife's health or injurious to her feelings, and the same principle is spreading to torts. It is true if an express train whizzes by you without touching you that you get no redress for fright, though the shock may shatter your nervous system. There must be 'impact' (*Victorian Railway Commissioners* v. *Coultas*)—so much mediaeval materialism still clings to our law, but such an alarm differs, *toto coelo*, from a delicious hoax like that of telling a wife that her husband is lying disabled by an accident (*Wilkinson* v. *Downton*. Here are all the elements of a genuine tort or wrong, and it would be a reproach to any system of law if such a hoax were not actionable as well as stupid and cruel. Mr. Justice Wright's decision constitutes, no doubt, a new departure; it opens a vista of possibilities fraught with problems for the judges of the future; but it is a new departure from which the age is ripe. All rational beings are now agreed that an injury to the feelings and to the nerves is a real injury, as, and often a worse injury than, one done to the body. *The Law Journal*, London, England.

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"I don't believe everything I hear about the ignorance of the average jury," said an old lawyer in reminiscent mood, "but once, when I visited a backwoods court in the mountains of North Carolina, I did happen on an incident that shook my faith for a time. The case was before a squire, and the prisoner was up for hog stealing. It was the rudest court and surroundings I ever got into, and I should not have been surprised at anything, but I was. After a couple of jack leg lawyers had got in what they had to say, the court turned the case over to the jury, and it adjourned to a barn to decide the innocense or guilt of the prisoner. And such a jury! I can never forget what a motly gang that jury was. In half an hour it came back and resumed its place in court.

"'Have you found a verdict?' asked the squire.

"'What's that?' responded the foreman.

"'Have you found a verdict? That's what,' replied the squire.

"'Why, Squire,' hesitated the foreman, with a foolish grin, 'we didn't know that thar wuz one lost, did we, boys?' And even that court couldn't stand it, but got up and swore."—*Detroit Free Press.*

In the case of the *North Packing and Provision Company of Boston* v. *Western Union Telegraph Company*, decided by the appellate court of Illinois, May 24, the appellant sent a telegram to its Chicago agent, L. B. Kent, July 31, 1893, instructing him not to buy any hogs the following day. The message was received at the stockyards office of the Western Union Company at 4:32 p. m., after Kent had gone home. The latter, however, called at the office of the defendant company at 6 o'clock the following morning, asked if there was a telegram for him, was informed that there was not, and then went out into the yards and began to buy hogs. He continued buying until 8 a. m., when the telegram was delivered to him. He had then purchased six cars of hogs, paid for them and shipped them. The plaintiffs sent in a claim to the Western Union Telegraph company for $1,226.31, being the difference between the cost of six cars of hogs purchased August 1 and the same quantity purchased August 2.

The court holds that the damage to the plaintiff company is the difference in price between the six carloads bought through the negligence of the telegraph company Tuesday and the cost of such property the following day. Justice Waterman says:

"The conditions upon the back of the message, not having been assented to by the plaintiff, formed no part of the contract; the contention of the defendant that its liability is limited to the 62 cents paid for sending the message is not the law of this state. A repetition of the message would not have tended to prevent the breach of the contract by the defendant. A stipulation as to repeating the message does not protect the company from liability for damages which repetition could have no tendency to prevent.—*Legal Adviser.*

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Ohio has followed the example of New York in substituting electricity for hanging.

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"Swipe" has been passed on by the Iowa supreme court. The word came up in case of the State v. Robert Lee, appellant. Somebody said "swipe" in the lower court, and it became an issue. So the grave, dignified and higher bench had to take official notice of it and incidentally to pass upon its meaning. In affirming the case the court decided that "swipe" means "to steal," and cited the dictionary as its authority.—*Albany Law Journal.*

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Lawyer: Now, Mr. Thrift, describe to the court the chickens that you charged my client, the defendant, with stealing.

Farmer Thrift goes in todetails, but is interrupted by the lawyer, who exclaims: "I have some chickens like those myself."

Farmer Thrift (resuming:) The chickens he took are not the only ones I have had stolen.

The Judge—"Didn't I tell you the last time that you were here that I wanted to see your face in this court no more?" Weary Watkins—"You did, yeronner, and that is exactly wot I tole the cop."

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Judges Baxter and Searle of the district court at St. Cloud, Minn., have just handed down an important decision in what is known as the Avon school case, whereby the school district and its teacher are enjoined from using the schoolhouse to give religious instruction or to teach the Roman Catholic catechism. The decision applies to all public schools in the state and and to all religious creeds. The practice of teaching the catechism is held to be contrary to the constitutional guaranty of freedom of conscience.—*Chicago Law Journal.*

We call attention to the parallel case of Conrad Pfeiffer vs. Board of Education referred to in last month's JOURNAL, which case the Michigan supreme court will be called upon to decide during the present term of court.—*Ed.*

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The Michigan supreme court has passed upon the Bible in the public schools, and has ruled it out.—*The American Lawyer.*

This announcement is erroneous, inasmuch as the supreme court has not as yet considered the case. The ruling out of the bible from the schools is merely the finding of the lower court, and an appeal is now pending in the supreme court.—*Ed.*

## BOOK REVIEWS.

PROBATE REPORTS ANNOTATED—Containing recent cases of general value decided in the Courts of the Several States on points of Probate Law, with Notes and References by FRANK S. RICE, author of "American Probate Law," and "Civil and Criminal Evidence." Price $5.50. Baker, Voorhis & Company. First volume of a series.

Probate law is becoming every year more important not only from the complications that arise, but from the fact that in each generation the property of the country must be adjudicated by probate courts. Hence it becomes important that probate law should be put in such a shape, that a thorough investigation of any point involved in probate litigation, can be made as easily as possible. It will be readily seen, that not only the statutory and elementory law must be readily reached, but all the important cases involving the more intricate points raised by important litigation should be so arranged that they can be readily referred to and most available, to the busy lawyer.

The author of this volume has undertaken to collect and report the important cases decided by the various courts, involving the more complicated questions arising in probate procedure and the principles of testamentary law. He has also emphasized and augmented their usefulness, by extending the annotations along all the lines of probate law. There can be no doubt but what lawyers will find this volume and the series of reports to follow, a very valuable addition to their library, which will quickly repay the cost of the books.

# RECENT MICHIGAN DECISIONS.

SALE BY ADMINISTRATOR—WARRANTY—RE-COUPMENT—FAILURE TO APPOINT COMMISSIONERS—SET-OFF IN ACTION BROUGHT BY ADMINISTRATOR.—It is within the power of an administration to bind an estate by a warranty of soundness, upon the sale of a personal chattel at a private sale.

Damages may be recouped in a suit upon a contract made by an administrator, inasmuch as a claim upon such a contract is not a matter to go before commissioners.

Where the contract relations arising out of a sale made by a decedent, exisited and were complete before his death, the rights of the vendee to recoupment for damages, would fall within the category of claims against a deceased person, rather than those acquired during the settlement of an estate.

One holding a claim against an estate, which might have been made the subject of set-off in an action by the deceased, will not be barred, under the provisions of sec 5901, How. Stat., from having the claim set off in an action brought by the administrator, it appearing that commissioners on the estate of the deceased had not been appointed and no opportunity afforded him for presenting such claim for allowance. —*Boltwood* v. *Miller*. May 25, 1897.

BRIDGE—DEFECTIVE CONDITION—NOTICE TO TOWNSHIP.—In an action to recover for injuries received by reason of an alleged defective bridge, it was shown that parties living near the bridge knew that it was shaky, unsafe, and rotten and that the attention of the Commissioner of Highways and Overseer of Highways was called to its condition, and it is held, that there was sufficient testimony bearing upon the question of notice to the township and that the court was in error in refusing to submit the case to the jury.—*Aben* v. *Township of Ecorse*. May 25, 1897.

TORT—SEPARATE ACTION—REPLEVIN—TROVER FOR VALUE OF GOODS NOT SECURED BY REPLEVIN.—Where several separate fraudulent purchases are made, the recovery in an action of replevin by the vendor of a portion of the goods purchased in two of the fraudulent sales, will not estop him from maintaining an action in trover, for the value of the other goods.

Trover would lie to recover the value of the goods which were not recovered in the action of replevin, the goods not having been in his possession at the time of the issuance and service of the writ, having been sold or disposed of by him.

In replevin no recovery can be had for goods not in possession of the defendant at the time the writ issues, except where the goods have been fraudulently disposed of or concealed to avoid the writ.—*Reid, Murdock & Company* v. *Ferris*. May 25, 1897.

APPEAL—REMOVAL OF CAUSE BY STIPULATION.—A cause cannot be removed into the Supreme Court upon stipulation between the parties.—*Hendrick* v. *Minor Lumber Co*. May 25, 1897.

CHANCERY PRACTICE—BILL—PROPER PARTIES—STATEMENT OF FACTS.—A court of equity will not entertain a bill filed to reach property interests which fails to join those who are necessary parties to the proceedings and fails to state sufficient facts to give the court jurisdiction over the premises.—*Stille et al.*, v. *Hess*. May 25, 1897.

REPLEVIN—TITLE—EVIDENCE.—In replevin for a quantity of logs the question as to the title of the property was purely one of fact, which it is held, was properly left to the jury to determine.—*Brundage et al.*, v. *Shelly et al.* May 25, 1897.

ADMINISTRATOR—ADVANCEMENT TO CREDITOR—RECOVERY BY ESTATE.—A payment made to a secured creditor by an administrator before the claim has been presented to the commissions can be recovered in an action by the estate.—*Miner* v. *Raymond*. May 25, 1897.

## CURRENT LITERATURE.

*The Living Age*, for all its fifty-three years of life, was never fresher, more vigorous or more valuable than now. The following partial contents of recent issues will give a slight idea of its world-wide scope and variety: "Some Changes in Social Life During the Queen's Reign," by Sir Algernon West; "The Integrity of the Ottoman Empire as a Diplomatic Formula," by Wemyss Reid and J. Guinness Rogers; "Among the Liars," is the title given to an account of a visit paid to Crete a couple of years ago, and is of interest at this time when the name has become so tragically familiar. "Russia on the Bosphorus" is of more than ordinary interest. "Recollections of Frederick Denison Maurice," by Edward Strachey; "The Twentieth Italian Parliament," by "Ouida"; "Brahms and the Classical Tradition," by W. H. Hadow; "The Position of Non-Conformity"; "The Passing of the Fur Seal"; "Herr Richter's Great Speech"; the attractive serial "In Kedar's Tents," by Henry Seton Merriman, which continually grows in interest; some good short stories and equally good poetry, with the Monthly Supplement devoted to American magazines, extracts from New Books, and a List of the Books of the Month, vindicate the claim of its publishers that *The Living Age* is a reflection of the world's best thought and literature.

*Public Opinion* under date of June 17th, is as good an example of what that valuable paper seeks to give its readers as any other number could be. "How the House Does Business;" Roosevelt's Address at the Opening of the Naval War College with editorial comment on it clipped from the leading papers of the country; editorial comment on the Urbana, O., lynching; a summary of congressional happenings; accounts of various foreign events, and a discussion of the many interesting sociological, scientific and religious happenings, and literature, gives us a great deal to think of. Multiply one such number by four and the result is interesting reading matter during the month, which more than equals the contents of even our largest magazines.

The June number of *Appleton's Popular Science Monthly*, is a magazine of 144 pages. Through every page facts follow facts. The leading article is the "Evolution of the Modern Heavy Gun," by Prof. W. LeCorte Stevens, then follows "The Silent City of the Muir Glacier," by David Starr Jordan, of the Leland Stanford University. This described what appears to be a clear fraud, the photographing of a mirage, by Richard G. Willoughby, a resident of Juneau, Alaska. The account is interesting even if giving extention to a glaring fraud. Another of David A. Wells "Principles of Taxation," the eighth of the series, interests the reader for a full 20 pages. "Suicide and the Environment," "The Racial Geography of Europe," by Wm. Z. Ripley. The "History of Alcohol," several other short articles and the usual comment on scientific literature and short science notes makes up a very interesting number.

*Popular Science News* for June, is in many of its articles very interesting and instructive. It promises also for July a treatment of the following subjects: "Origin of Petroleum," "The Thief Palm," "The Sun," "Self-Ignition," "Philippium a New Element," and "New Rapid Telegraphing."

The *Atlantic Monthly* finished with its June number Paul Leicester Ford's novel "The Story of an Untold Love." The story is a beautiful one and will do much to make Ford the popular novelist he deserves to be.

# MICHIGAN LAW JOURNAL.

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## *THE PATRIOT LAWYER.*

HON. ALFRED RUSSELL, LL. D.

Some persons have said, in connection with the interest shown by Americans in the Victorian sixty-year festivities, that there is some evidence of a desire to return to the monarchical principle.

The teaching of the American Bar has always been in favor of the American principle of government, and it may be useful to point out one distinguished example.

Truly to describe the patriotism of Daniel Webster would be to write his life.

Love of country was the central sun around which his great planetary thoughts and acts performed their majestic movements.

Nothing less than the continent could fill the measure of that love—not his native New Hampshire, nor his adopted Massachussetts, nor his sectional New England; but broad America.

To him the great Carolinians were Americans all, and when he calls the roll of the sacred spots of Massachussetts it is American liberty which was born there!

When he would characterize true eloquence, behold the image of an orator defending the altars and firesides of his native land. Then genius itself is subdued in the presence of a higher power, and patriotism is eloquence.

To his countrymen he cries: "Let us enlarge our conceptions "to the circle of our duties. Let our object be our country, our "whole country and nothing but our country, and, by the blessing of "God, may that country itself become a vast and splendid monu- "ment, not of oppression and terror, but of wisdom, of peace and of "liberty, upon which the world may gaze with admiration forever."

Indeed, his true American feeling was not limited even by the boundaries of the continent, but followed the American idea of liberty everywhere—to Greece, dear to him as both scholar and patriot; to the land of Maria Theresa and Kossuth; to the new republics of South America; to the countries darkened by the Holy Alliance.

This abounding love of country was but the necessary expansion of his surpassing love of his kindred, his birthplace, his college and the localities of his youth. Consider a moment the environment of his cradle. Born in 1782, just half a century after the birth of Washington, in the closing year of the struggle for independence, his childhood was spent in the native air of patriotism. His father was a typical citizen-soldier of New Hampshire who had served his country in the old French war of 1763 as private and captain, next in the Revolution, and afterwards in the state convention called to ratify the federal constitution, where, in a few direct and forcible words, he favored its adoption for the reason that it would establish a government acting directly on the people of the states. New Hampshire was full of men who had been soldiers. They told the boy of the old Colonial wars, of Crown Point and Ticonderoga, and the later seven-years' war of the Revolution. The women of Salisbury, his birthplace, gossiped how they had laid their ears to the ground and heard the firing at Bunker Hill—destined to be made afterwards forever famous by his words. And so, when he grew to years and came to speak for his country, his heart was so full of fervid patriotism that he poured forth the impregnation of his genius upon every spot and name connected with the history and traditions of the government, and gave them fresh and immortal life. He so associated himself with them that ever after, when Americans think of those spots and those names, it is in the thoughts of Webster. Do we recall Alexander Hamilton? It is he who, in the words of Webster, smote the rock of our national resources and the abundant streams of revenue gushed forth. We speak of Bunker Hill, and the shaft rises in our thoughts "to meet the sun in his coming!" After two hundred years, the fathers of New England reappear, with lineaments of life, in the Plymouth address. Adams and Jefferson

find an undying brotherhood, at last, in the sacred precincts of Faneuil Hall, in Webster's memorial oration. Men and places in our history, not hallowed by his words, are like the forgotten braves before Agamemnon, who had no poet. Webster is the prose Homer of America, and, as Dr. Johnson said of Homer, that succeeding epics had done nothing but new-name his characters and paraphrase his incidents, so we may say succeeding patriots can only reproduce Webster.

His three great orations were not political speeches, but were devoted to bringing before his countrymen the most glorious examples and achievements of American patriotism. Like all his works, they were the result of his deep interest in public affairs, and, although full of the wisdom of statesmanship, they in no respect resemble written books composed in contemplative retirement.

He rejected the self-indulgent maximum of Epicurus, so popular in our day—"let no wise man meddle in public business," *ne sapiens accedat ad rempublicam;* and followed the teaching of the Roman sage, that the study of philosophic truth should always be made practically applicable to the great interests of philanthropy and patriotism.

These patriotic discourses may be fitly characterized as rising to the dignity of historical events in American records.

But Webster was not merely the describer of the patriotism of others. He was an actor, second to but one other American, in deeds of patriotism. There is nothing, said Cicero, in which human virtue can more closely resemble divine powers than in establishing new nations, or in preserving those already established; "*civitates aut condere novas, aut conservare jam conditas.*" Upon the arches of the Union we may inscribe, "Founded by Washington; preserved by Webster."

With him, attachment to the Union amounted to a passion. In his own words, spoken of Samuel Dexter, "more than all men, or as much as any man, he was attached to the general government and the union of the states. The preservation of the Union—newly founded; younger than himself; the work of Washington, whose memory he revered more than any eathly thing; helped to be made by his father, who loved it; garnering up all the great results and benefits of the Revolution, useless without it—he regarded as the paramount object of his life. He could comprehend the whole country. He created the sentiment of nationality in the common mind. When the doctrine was put forth, with astonishing

power, that each state had a constitutional right to withdraw for any reason which it might deem sufficient, it was the trip-hammer of Webster's patriotic Hayne speech of 1830 which crushed it. He brought constitutional law away from courts and senates and laid it before the common jury of the people. He made plain to the common understanding of his countrymen that the constitution does not establish a federative league, but is derived from powers communicated directly by the people, and acts directly on the people; and that withdrawal would mean war. It is the intense glow of patriotism all through the massive reasoning of that speech, and flaming out at the close in that magnificent apostrophe to our country's flag, which marked it as the greatest parliamentary effort of modern times, if not of all time. The district school, the college, the newspaper, the pulpit, the dwelling, the street, the store, the shop, the farm, were filled with the teaching of that speech. It was a national education. It leavened the whole lump of the political mind. The political flesh and blood of the entire new generation in the north—that generation which was to fight the war for the Union—was built up of the nourishment of that speech. Out of the seed of that speech sprang the harvest of men known as "the great uprising of 1861." Our northern Caesars were fed on the meat of that speech—Lincoln, from the prairie state; Chase of Ohio, another son of Dartmouth; Stanton and the rest. The most famous passage in Lincoln's Gettysburg oration, "that government of the people, by the people, and for the people, shall not perish from the earth," is a paraphrase of a sentence of that speech: "It is, sir," said Webster, "the people's government; made for the people, made by the people, and answerable to the people." The Unionism of that speech animated every American soldier during the rebellion. Webster's theory of 1830 was Grant's practice in 1865, and Appomattox was the final and supreme result of Webster's logic.

Forty-seven years have passed since 1850, and looking back dispassionately, as we now may, upon Webster's much maligned speech of the 7th of March, we can see that it was an effort of patriotism of hardly less service to his country than any act of his life; that it was the logical product of all the acts and inculcations of that life. There was danger in 1850—great and imminent danger then, of that civil war which was ultimately inevitable, and which came ten years later. Had it come in 1830—had it come in 1850—it would have ended beyond all question in the dismemberment of the Union and the perpetuation of slavery. At neither of those periods was the

north populous enough, nor rich enough, to maintain the Union; and, as we well know, even in 1861, the scale long in doubtful balance hung. War is the terrible litigation of states, and it was the two "continuances" of this momentous case, obtained by Webster, which saved the final verdict! Did not Lincoln agree with Webster that disunion was worse than slavery, and union better than emancipation? Who can doubt that if Webster had survived he would have been with Douglas by the side of Lincoln!

But, by reason of that speech, the same Webster who had in 1825 received every vote but ten, cast in his congressional district, was assailed with a torrent of vituperation as fierce as that poured at one time upon Washington.

If there is one part of the Union in which, more than in any other, we should revere the patriotism of Webster, it is here in the great northwest. His influence in the development of interior America was unbounded. Entering congress just before the transitional period succeeding the peace of 1815, the question of the just powers of the government with relation to the internal affairs came up to be settled. He devoted himself to the establishment of the doctrine of internal improvements, and placed it forever upon an impregnable basis.

Kept back by the counter doctrine as to roads, harbors and public lands, the northwest could have no more existed than if shut off from the sea by an Atlantic nation and a Gulf nation! Chicago, equally as much as New York, is the child of Webster's patriotic service!

I can enter upon no elaboration of his patriotic acts:—how he maintained a safe currency and the public faith; how he provided for criminal justice; how, as twice secretary of state, in conducting our foreign relations, he strove for honorable peace and to make his country respected, honored and feared as one of the great nations of the earth; how, in his great state paper, addressed through the Austrian minister, to the governments and people of Europe, he opened their eyes for the first time to the extent, power and resources of the United States, compared with which, as he said, the possessions of the Austrian House of Hapsburg are but a patch on the earth's surface; how, upon two conspicuous occasions, he averted war with a kindred nation, establishing in the Ashburton treaty of 1842 a wise precedent for the later Alabama arbitration, and a course of feeling between the two English speaking nations which has made war between them hardly possible.

It is said that he originated no new measures. But there is something greater than to originate measures. It is greater to create national sentiments; greater to form the minds of men who make measures and make war; greater to imbed ideas in the fundamental law underlying all measures. The ghost of Webster clad, like Hamlet's father, in complete steel, will ever walk, and lay his commands on all later patriots.

This great patriot was the grandest looking man that ever lived. As he walked the streets, he seemed the embodiment of the United States of America; of their history, their power, and their high renown; and, when he rose up in the open-air meeting, amid the gaze of uncounted multitudes, divine in countenance and stature—"*os humerosque deo similis*"—human enthusiasm reached its limits, and men called him "god-like," as the Athenians did Paul!

Strike out from our history his name, and all that he did and said in the public service, and the influence of his life and teachings, and not only this continent, but the world itself would be other than it is. And, on the other hand, blot this country from the map of nations, and destroy all other records of its existence, and in the writings of Webster alone posterity would find a splendid epitome of the political science of America, and the very soul of American patriotism.

Edmund Burke declared that it was not only in the Roman customs, but in the nature and constitution of things, that obloquy and abuse are essential parts of a triumph. And so it must needs be that this patriot Webster had bitter enemies; but they are forgotten, while his fame shines in all its original lustre; not a star obscured.

As the years recede, other figures fade and disappear; but this Colossus of Patriotism will always stand out, a Pharos to the arriving generations.

# THE ASHLEY MURDER TRIAL.

ALLAN H. FRAZER.

## *The Deceased.*

James Magee was born in the city of Detroit and at the time of his murder was twenty-six years of age. He was unmarried but engaged to a well known young lady, possessed of education and refinement. He was six feet tall, weighed one hundred and seventy-five pounds, was a trained athlete and had won high honors as a boxer in the Detroit Athletic Association, of which he was a prominent member. He was noted for his amiable disposition, agreeable manner and pleasing personality. He was not known to have an enemy, outside of the Ashley gang, in the city of Detroit. His business was that of freight solicitor for the Michigan Central R. R. Even tempered, he was never known to be out of sorts, was never known to use a profane word, never used tobacco or liquor in any form. He had always been a consistent Christian, his Bible his companion. And after he was murdered, in his room was found his Bible left where he had been reading it before retiring, as was his nightly custom during his life.

He lived with his parents on Grand River avenue, Detroit, and on the night of the murder the family consisted of his father, mother, himself, his sisters and four brothers, all unmarried except one, William Magee Jr.

## *The Defendant.*

Frank Ashley was a man thirty-seven years of age, engaged in the saloon business, in the city of Detroit. He was born in Canada, and at the time of the murder of James Magee he was married to an estimable lady and had two children, a boy aged ten and a baby in arms.

The idea had been in his mind for years that he was something of a fighter, and he possessed the usual sporting proclivities of many men engaged in his line. He had obtained some prominence as a ward politician and generally brought certain delegates from his ward. He had gathered together up to the time of the murder, a sum of ready money, his home and some other real estate. His previous life had been one of pleasure; he was a patron of the race track, and semi-occasionally engaged in a saloon row, together with two of his brothers, who were of the same stamp as himself. One of these rows took place a few years before the Magee murder in a saloon occupied by a man named Holtz. It started by three of the Ashley brothers going down and engaging in a row in the saloon, where guns were used by them, but Holtz, the assaulted party, fired on them and killed one of the Ashley brothers. There were four of the Ashley boys together, and while one of them, John Ashley, was a law abiding citizen and did not engage in the usual escapades of the others, the rest of them had carried their lawlessness to such an extent, that in the western part of the city where they were best known, they were called the Ashley gang. Upon the death of one of them, there only remained Frank Ashley and two brothers, John and Charles. Charles Ashley some four or five years ago went into a saloon and in a fight kicked a man so severely as to cause his death. The political influence of the Ashley gang and their friends was sufficient to permit Charles Ashley to escape punishment of the law. While in years gone by various individuals of them have frequently been before the courts for offences running from misdemeanors to the highest felonies, their influence and money and skill in manipulating witnesses and juries, have kept them out of serious difficulties up to the time that Frank Ashley was tried for murdering James Magee.

*The Case.*

At about 12:25 in the morning of July 8th, there was a gentle rap at the front door of the Magee home. The mother, Mrs. Magee, having just retired, arose from her bed and went down to the door in her night dress, and without opening it she asked through the glass double doors, "Who is there?" and a voice inquired, "Is Jim Magee in?" Mrs. Magee answered "Yes!" and the voice outside said, "I want to see him!" Mrs. Magee upon receiving the message retraced her steps up-stairs and called her son James. He was asleep and she awakened him and told him that some one

wanted him at the door. James got up, drew on his trousers and went to the door. He unlocked it without speaking to the person outside, and as he pulled it open, Mrs. Magee, the mother, standing at the head of the stairs and looking down, saw the flash of a gun and heard the report. She instantly screamed—which raised the entire household—and she descended the stairs. As there was no light down-stairs at that time she could not see where her son was. She was followed down by two others of her sons, William and Walter Magee. On of the boys turned to the left of the hall which was the parlor, being directed there by heavy breathing, and feeling around he found his brother laying with his head towards the street. William Magee called for a light which was brought by Mrs. Magee going up-stairs and bringing a lamp that was used to light the upper hall. A hasty examination was made and they saw at once that their brother was in the throes of death, and that at every pulsation of the heart out of the wound in the left breast the blood was gushing. James Magee drew up his legs convulsively, straightened them out and died immediately without ever uttering a word. He had been shot through the heart. The family rushed out on the street for help; two pedestrians in front were found and one held up a straw hat and said: "Here is his hat!" The murderer after firing the shot went down off the steps and turned to the left, ran along on the grass and was busy putting something that shone like a pistol into his left back pocket, and as he ran his hat fell off. He did not stop to pick it up but ran to the first corner above the house, turned to his left and kept on running. He was not pursued by any one and soon the sound of his footsteps was lost.

The confusion about the Magee home was great. Police officers came running in, and the question immediately arose as to who could have committed the murder. James was not known to have any enemies, but the detectives at once canvassed the matter as to who could or might have had any imaginary grievance. Two occurences only in his short life called for attention.

First it was learned from an eye witness that in the month of March before the murder, James Magee had trouble with three men down in the center of the city at the corner of Lafayette avenue and Griswold street. Magee was on his way home from the office, and as he passed the corner, two newsboys were fighting in the street surrounded by a crowd of pedestrians. Magee elbowed his way in to see what was the matter. Three on-lookers were encouraging the boys to fight. Magee reached down and separated the boys and as

he did so, he was struck by one of these three men and the other two started to whip him. Magee with his left hand threw one of them aside, and with the other swept another out of the way and drew back and knocked down the third. The police then came and interfered. Explanations followed and Magee parted pleasantly with them. One of the three seemed to know Magee by reputation and admitted that they had tackled the wrong man. The names of the three men were not known, but there was no evidence that any hard feelings were engendered as one of the three explained that they were in the wrong for encouraging the newsboys to fight and for striking Magee when he was trying to separate the little fellows.

The second episode in his life arose with the Ashley gang. It seems that on the preceding Christmas day, Alex. Magee, a brother of James Magee, had gone to the saloon of Ashley and had spent some few hours in the place and got under the influence of liquor. Without any provocation and while Alex. was in that condition, Frank Ashley jumped on to him and gave him an unmerciful whipping and kicked him in the face, and so beat him that his nose was broken and he was left in a terrible condition. Ashley claimed that he whipped Alex. Magee for some insulting remark made to him by Alex. The latter was the only member of the Magee family who up to that time had ever gone into Ashley's saloon, and it seems that Ashley took a slight excuse to administer a whipping to one of the Magees because some busy body had informed him that he could not whip the boys of that family. The other boys did not see Alex. until the morning of the 26th, and on discovering his condition, one of the boys suggested that they go up to the Ashley place and find out why he had whipped Alex., and unless satisfactory explanations were made, to teach Ashley that he could not take an unfair advantage of one of their brothers. Accordingly, all went up at once to Ashley's place. James accompanied his brothers for the purpose as it was explained at the trial, to see that Ashley took no unfair advantage and to hold off the usual crowd of hangers-on, and toughs usually found at that place. William Magee was to do the whipping; James was to see fair play, and the younger brothers were to assist should it become necessary. Upon entering the place, James and William went up to Frank Ashley and asked him why he had whipped Alex. Ashley commenced to equivocate, and before any one thought, George Magee, one of the youngsters of the party, reached through between James and William and struck Ashley with a stick. Ashley whirled and ran around behind the bar. At

this time there were twenty-five friends of Ashley in the place, but they made no move to help him and the three younger boys chased Ashley out of the saloon, caught him on the street and whipped him, using their fists only. James at no time during the fight struck or offered to strike Ashley, in fact, was not present at the real whipping that the three younger brothers gave him in the street. Ashley needed the services of a physician to dress his wounds. It was also learned that Ashley really held James Magee responsible for the whipping that he had received at the hands of the younger brothers, and had stated that he would get even with James.

Police detectives started on his clue for the murderer of James Magee. They at once put under arrest John and Charles Ashley the night of the murder and made a close search for Frank, but he was not to be found. Upon taking John and Charles to the station and questioning them as to their whereabouts during the night, they told straight forward stories. Upon verifying the details, the police became satisfied that they knew nothing of the murder and they were promptly released, and the search continued for Frank Ashley. When the latter was last seen he was going down Grand River avenue at 12:15 o'clock towards the Magee home, three-fourths of a mile distant, in company with Henry Peabody. Peabody was found and said he had been in Ashley's saloon up to the closing time, and had left the place alone and not with Ashley, and he gave no aid to locating Frank Ashley. He was, however, kept in custody. Another man was found named Perry Ellis, who informed the police that he worked around Ashley's place that day and that Ashley had been drinking; that he had talked with two men in the saloon earlier in the evening, and that he heard Ashley say to these two men in a half crying manner, that if it was not for his wife and children that he would get even with him, but he could not tell whom he mentioned; at about 12 o'clock midnight Ashley borrowed Ellis' coat, put it on, and went around behind the bar and took a revolver out of the drawer, put it into his pocket and left the saloon, and that was the last that Ellis saw of him that day. The hat that was picked up in front of the Magee house had been shown to Ellis, who identified it as the hat worn by Ashley when he left the place at about twelve o'clock midnight, July 7th.

Ashley was arrested at the house of his wife's mother, an old lady named Quinn, who lived a few blocks from the scene of the murder. Mrs. Quinn informed the officers that Ashley had been at her house ever since a quarter to twelve o'clock on the night of the

7th of July, and that he had been there all the time up to the moment of his arrest. Ashley when arrested, conversed very little with the officers, but told them that he intended to give himself up after dark that night. Upon being taken to the police headquarters and being asked as to his whereabouts at the time of the murder, he declined entering into any extended conversation with the officers, but simply informed them that he could account for his whereabouts and that he was innocent of the murder of James Magee. He was locked up, however, and charged with the crime. At the coroner's inquest, held a few days later, to inquire into the death of Magee, Ellis and Peabody were put on the stand, being the only two in Ashley's saloon when he started out before the murder. Ellis made a written statement to the police that seemed to be very frank. Peabody, on the stand denied that he left the saloon and went down the street with Ashley, and seemed to wish to get Ashley out of the trouble. However, two police officers had met Peabody and Ashley on Grand River avenue at 12:15 o'clock going towards the Magee house. It became clear that Peabody was a wilful liar and would go to any length to free Ashley; so on the conclusion of the testimony and after the jury had retired, the prosecutor ordered that Peabody be locked up on the charge of perjury, for it could be seen that unless this gun was spiked, it could be used with terrible effect against the prosecution, since he was liable to tell any story best calculated to aid Ashley. The importance of his testimony arose from the fact that he was one of the persons who were last in company with Frank Ashley before the murder. His evidence would become very valuable for the defense on a manufactured alibi.

Before the arrest of Ashley there came into the station a man named John Beckley, who told a remarkable story to the police. Beckley lived on Twelfth street, between Magnolia and Linden streets, where he had lived for 13 years. He was a man of middle age, sincere in manner, established in business, and carried conviction of the truth of his story to the mind of any fair-minded person who could see and hear him. The alley back of his house opened into Magnolia street, along which the murderer of Magee had run, and the last heard of the murderer's foot steps indicated that they were going towards this alley and were within a block of it. Mr. Beckley said that on the morning of the 8th of July, as was his custom, he got up and went out to his barn and fed his horse; then he returned to the house and was busy for over an hour. After eating

his breakfast he again went into the barn and there found a man sitting on a keg. The man was covered with dirt; he had no hat on. Mr. Beckley recognized him as a person he had frequently seen on Grand River avenue. The stranger was nervous and informed Mr. Beckley that his name was Frank Ashley. He wanted Beckley to go down to his brother's saloon—several blocks away—and get a hat for him, stating that he had had some trouble the night before. He offered Mr. Beckley $100.00 to put him in his wagon and cover him up and draw him out of the city. He then offered him some money to go down and get a hat, all of which Mr. Beckley refused to do. Ashley stated that he had been in the barn all night and had slept on the top of a coal bin upon a lot of debris. After Mr. Beckley at his request had got him some water, Ashley washed, and after he had got the dirt brushed off his clothes, Mr. Beckley gave him an old straw hat that had been lying about the barn for two years. Ashley put on this hat, went out of the door and down to Magnolia street and there turned to his right. The straw hat that had been picked up in front of the Magee house had no mark in it, but the hatter's name was in it and he measured the hat and found it was 6⅞. He testified that Frank Ashley bought that style of Mackinaw braid and that size of hat on the 25th day of June.

After the murder, a search of the saloon revealed in one of the drawers an unloaded revolver of 32 caliber. The size of the bullet that killed Magee was a 38. The revolver found in the saloon was not in working order and could not be discharged. The two people that saw the man come off the steps after the murder were not able to identify Ashley, but one stated that Ashley was about the same size and build as the man they saw come from the house, and one stated that the man who ran by him had an absence of hair high up on his forehead and to one side, a peculiarity noticeable on Frank Ashley but which could not be called baldness. These were the salient points of the prosecution's case.

Mrs. Magee testified that the voice that called through the door to have her son James come down was the voice of Frank Ashley. The prisoner had a peculiar voice, noticeable to any one that ever heard him talk. It is hard to describe it, but might be characterized as a high tenor tinged with falsetto. She had never heard Ashley talk from the time of the murder until the first trial in September, when Ashley went upon the stand. When she heard his voice she grew visibly affected and excited, and shortly after went onto the stand and positively identified the voice of the murderer as that of Ashley's.

When Ashley was tried the second time, upon going on the stand, he lowered the tone of his voice and destroyed before the jury completely the peculiarities of his voice so marked when he talked naturally.

*The Defense.*

The prisoner was defended by Thomas J. Navin, Esq., and Col. John Atkinson. The prisoner had many personal friends and was enabled to rebut every damaging fact presented against him by the state. During many days while the defense was being put in, it seemed impossible ever to be able to satisfy the jury that the defense was false and based on perjury. The break came on the last week of the trial. Ashley was doomed. Through the trial the prisoner manifested good spirits and splendid nerve, but when the stage was reached where the prosecution demonstrated that his many witnesses were wilful liars, Ashley became depressed and remained so to the end.

Ashley stated that he was in his saloon the night of the seventh of July; that the preceding night he had spent at a road house out Jefferson avenue; that at supper time, July 7th, he and his wife had had words about his staying away nights; that he was very fond of his wife and children, and that she had told him that unless he acted differently she would leave him. Further testimony showed he went over to the saloon and commenced drinking, and told two of his customers, who were firemen, how badly he felt and cried in their presence. The firemen had with them a friend who wanted to go into the saloon business. Ashley told him not to go into the business; that it was a bad business; that he had been let down by his best friends, and that if it were not for his wife and children he would get even with them. At closing time, on account of the trouble he had had with his wife, he did not want to go to his house for his coat—which was across the street from the back end of his saloon. He therefore borrowed Ellis' coat and left the place. He took no revolver with him and had none; the only revolver about was the broken one in the drawer.

Ashley stated also that going out on Grand River avenue, he went to the corner of Fourteenth avenue, which he reached at 12:30. Witness Robert Watson swore that he came down Grand River avenue and met Ashley, with whom he was acquainted, on the corner. He fixed the time at 12:30. Two other witnesses saw Ashley on the corner. After waiting on the corner of Fourteenth and

Grand River avenues a few minutes and talking with these three different people, Ashley and the witness walked down Fourteenth avenue a few blocks, turned to the right two blocks, and Ashley entered the house of a woman with whom he was acquainted, named Mrs. Cook. Witness Watson swore that he left him on the steps of this woman's house and he, witness, went on towards home, some two miles away.

Mrs. Cook swore that Ashley came to her house five minutes to one. He was intoxicated. He came in and sat down on the sofa and fell asleep. She went back to bed and says that he was on the sofa when she got up in the morning and that he stayed at her house until about ten o'clock in the morning of July 8th. Ashley says he left and went to his mother-in-law's, Mrs. Quinn, as was his custom when he was on a spree or had had trouble, and that he stayed there until the time of his arrest.

Two members of the fire department who had the conversation about which Perry Ellis testified, came forward and corroborated Ashley's version of the talk.

Wood and Pepin were two other witnesses produced by the defense who told a singular story. Wood was a painter and Pepin a plasterer. They said that they had been doing some work for a firm named Edgar and William Durand; that early on the morning of July 8th Pepin went to Wood's house and showed him a note he had received by mail the night before when he had returned home at ten o'clock. The note had been delivered during the day, but being absent, he did not get it until late at night on the 7th of July. This note was directed to "Mr. Wood," dated July 6, 1896, and requested Mr. Wood to go down the next morning to a certain office and get his money. It also said to bring Mr. Pepin with him. It was signed "E. Durand." On the morning of July 8th, 1896, Wood and Pepin started for Durand's house, and when within a block of it, they testify that they saw Durand turn the corner beyond them and go towards Grand River avenue. They were at the corner of Magnolia street; so in order to head him off they went down Magnolia street towards Grand River avenue. This was about 5:30 o'clock in the morning. When they reached the corner of Beckley's alley on Magnolia street, a man came out whom they described as a man with an old straw hat on his head, and that the man said to one of them, "How will you trade hats?" and also mentioned something about $1.00 to boot, which the witness did not seem to understand. They did not stop to talk with the man but

kept on walking to head off Durand. They say that this man who came out of the alley at the time Beckley says that Frank Ashley left his barn was not Frank Ashley.

Durand was hunted up. It was learned from him that on the afternoon of the 6th of July he had gone to Wood's house to tell him to come and get his money. No one was at home so he took out of his pocket a piece of paper, tore it off, and kept one part of it which he produced and on the other part wrote the note heretofore mentioned. He put it through the key hole of Wood's front door instead of sending it by mail, and Pepin had never received the note except through Wood, although Wood swore positively that he never saw the note nor knew anything of it until shown to him on the morning of July 8th about six o'clock by Pepin. The note showed for itself that Durand's story must have been right.

Witnesses were produced by Ashley to corroborate his version as to the loss of his hat which he claimed occurrred in this way. He admitted he bought the hat on the 25th of June and stated that in the afternoon he went to some races in the western part of the city. On his coming home a storm came up and his hat was blown off and lost and that he never saw it again. Witnesses were produced who saw him coming home and who testified that they saw his straw hat blow away and saw him go into his own barn without a hat, and that he was drenched in the storm. He stated he bought another straw hat from another hatter within a day or two after the storm, which hat he wore at the time of the arrest. I have learned since from a reliable source—a fact not proved in the trial—that after Ashley had left Beckley's barn, he went to the house of a friend of his, a blacksmith, and that this friend obtained a new hat through one of Ashley's brothers. This friend then gave it to Frank Ashley and urged him to leave his house. Ashley left at once and then went over to his mother-in-law, Mrs. Quinn.

*The After Clap.*

On the conclusion of the trial warrants were issued against Wood, Pepin and Watson for perjury. They were all put on trial during the year and in June, 1897, about a year after the murder, the last one was tried. All were convicted, together with Peabody, the perjurer at the coroner's inquest, and all were sentenced to Jackson for five years.

Since the confinement of Frank Ashley at Jackson he has made one attempt to commit suicide and nearly succeeded. The guards

recently found him one morning in a very weak condition, caused by the loss of blood from the veins of his wrist, which had been cut with the evident intention of ending a life now apparently hopeless.

The trial and conviction of the murderer, as well as the trial and conviction of the perjurers—the latter for a crime not too uncommon, although one for which there are few convictions—will be a lesson not only for men who are fighters, but a warning to those who are liars.

*Rebuttals.*

The hat story told by Ashley was rebutted by a neighbor who remembered the day of the big storm and who saw Ashley come home bareheaded. This witness testified that about an hour after Frank Ashley came in, his little son came through her yard from the Ashley barn carrying a straw hat in his hand. The defense drew out from her that the little boy said it was his father's. The value of Mrs. Cook's testimony was destroyed by her previous life in Canada. Officers came from there and said her general reputation for honesty and truthfulness was bad. At her house in Canada stolen property had been found, and her husband, a hired man and another, had been sent to prison for stealing cattle. The stolen property had been found on her place and she was shown to have had some knowledge of the facts.

The two trials of Frank Ashley for the killing of Magee cost a large sum of money. The defendant is said to have expended nearly seven thousand dollars in conducting his defense. On the last trial, the jury by which Ashley was convicted, was kept secluded and under the constant surveillance of the officers. It was made impossible to tamper with the jury, a danger which had been much feared.

The first trial extended over two weeks, and the second one occupied three weeks. There were fifty-five witnesses sworn during the proceedings, of which number thirty-five were for the prosecution and twenty for the defense. The prisoner was sentenced December 22nd, 1896, to life imprisonment at Jackson. There is absolutely no doubt as to his guilt.

# MICHIGAN LAW JOURNAL.

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EDITORS: GEORGE P. PALMER
ROBERT E. GRAHAM.

## *NOTES.*

In our articles for the month the MICHIGAN LAW JOURNAL presents one from the pen of Hon. Alfred Russell, who writes in a very interesting manner of Daniel Webster. The latter was a near relative of the former, and keeping this in mind, the article means more to the reader.

Our second article is written by Allan H. Frazer, now serving in the office to which he has been twice re-elected, that of prosecuting attorney of Wayne county, Michigan. The subject on which he writes is one that arose in the doing of his work. The case is the well known one of the People v. Ashley, in which the defendant was found guilty of murder. The crime, the trial, the conviction, and the after clap in the shape the conviction of witnesses for the defense who had been arrested for perjury, is all graphically told as as from the lips of an eye witness of and actor in the scenes portrayed.

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We record the recent death of George V. N. Lothrop. He was a man of remarkable ability and one whose life attained the success his ability and merit deserved. He was a man who seemed great in himself, but whose greatness was made the clearer by contrast with other men. He has been successful as a lawyer, orator and business man, and has received national honors through his ministry to Russia. With his death and that of Mr. Joy, the number of the departed of those men who saw the rise and early progress of this state and aided so materially in its advancement, is almost complete.

The legislature of New York at its last session passed a bill providing for the impanelment of special juries for particular cases. The intention of the act is to get juries of merchants and business men to serve on the special jury and to excuse them from the ordinary duty of jury service.

The *Albany Law Journal* seems inclined to question the constitutionality of the law. Its usefulness is certainly probmatical and in any event narrow.

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The supreme court of Ohio has declared unconstitutional the "Torrens Law" of April 27, 1896. Its decision is based on practically the same reasoning as was used in the Illinois decision on a similar statute of that state, viz.: Permitting a judicial finding by ministerial officers, and permitting the taking in some cases of private property without compensation and for purposes not public. The case deciding this point is found in 38 O. Law Journal 26, (July 12, 1897), and is the case of *State ex rel. Attorney General* v. *Guilbert, Auditor et al.*

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A bill was introduced in the Illinois house of representatives at the last session of the legislature of that state, directed against the growth and extension of the department stores. Sixty-three representatives voted for the measure. It is claimed in an editorial recently appearing in a current number of one of the law papers of Chicago, that the force behind these votes probably came through politics and sentiment, and recalled what is probably the fact that thousands have been benefited by such stores where only individuals have been injured. We would urge against this view that opportunities should, so far as possible, be made equal to all men unless the advance of civilization demands a different rule, and a great injury to some may more than offset a slight benefit to many. Shopkeepers of special and particular articles can as well fill the needs of the people as could the proprietors of one large store containing room enough and articles enough to supply all needs for all men. It is cheaper buying at such a place; but here again we meet the difficulty that tends to become danger. The growth of such a business is encouraging the concentration of capital and the enfored idleness and debasement of labor. It saves as machinery saves, labor and time. It has its advantages as has machinery, but never should it be used if its use means in the long run too great an advantage to the capitalist as compared to the loss of opportunity to the laborer or to those whose capital is so small as only to become available by the addition of personal labor. This seems to be threatening and appears so great an evil, that the end would seem to be within the reach of our senses. It is a great industrial change, but to the writer, a change for the worse. It needs legisla-

tive attention, but it must receive it from thoughtful and conservative specialists. The editorial which occasions these remarks is as follows:

"The Illinois house of representatives has given the anti-department store bill its quietus, although sixty-three representatives voted for the measure. Without doubt politics was the motive power behind the bill, and supplied by far the largest number of votes, the remainder being made up of sentimentalists, who were sincere in their belief that the interests of the comparatively few small dealers whose business has been injured or ruined by the great department stores are entitled to be placed above those of tens of thousands of families who have been and are being benefited by the big establishments. As has heretofore been pointed out in these columns, the rise and great popularity of the department store is only one feature of the industrial changes, the end and aim of which is to bring about concentration and consolidation in order to effect economics aud bring down prices. To attempt to stop this movement is as useless as was the sincere, but ludicrous, effort of Mrs. Partington to push back the Atlantic ocean with a mop. It is but natural and proper that we should sympathize with those small dealers who are pecuniarily injured by the department stores, and endeavor to aid them in every proper way, but to stop great industrial changes and social progress in their interest is so grotesquely absurd that it is well the courts were not called upon to pronounce such laws unconstitutional, as they would undoubtedly have done, without any hesitation."

## LEGAL MISCELLANY.

A prisoner in a sheep stealing case in Queenstown, Cape Colony, became so interested in the legal arguments that he offered to bet the judge 10 shillings that he was wrong in his view of the law. The fellow was finally discharged, but before leaving the court he offered to pay the judge the stakes because now he was convinced that his Honor was right on the legal point in question. That no contempt was imputed was shown by the hearty laugh which came from the judge at this climax.—*Chicago Law Jaurnal.*

Amusing "news," to the effect that a new precedent for the courts had been established by allowing a conversation through telephone to be admitted as evidence, recently reported the judge as saying: "I find that this point has never been ruled upon, and I think it is time a precedent was established." Commenting on this, a New York paper says the judge made a mistake, because a precedent was established in 1894 by Judge Benedict, of the United States circuit court for the southern district of New York in the case of United States *v.* Matthews. This, again, is somewhat pleasant, since courts have been admitting evidence of that kind for about a dozen years, and the General Digest has had for it a specific division in the title "Evidence," headed "Telephone Conversations." Among the cases in which such evidence has been admitted are *Wolfe* v. *Missouri P. R. Co.*, 97 Mo. 473, 3 L. R. A. 539, and *Oskamp* v. *Gadsden*, 35 Neb. 70, 17 L. R. A. 440; and with the latter case is a note in which the previous decisions on the subject are reviewed.

The admissibility of such evidence where there is testimony that the voice of the speaker was recognized has been so long established that it is very ludicrous to read telegraphic news heralding that its admission makes a new precedent for the courts of the United States. The statement in the despatch that the judge said he found the point had never been ruled upon doubtless originated with the enterprising reporter.—*Case and Comment.*

The mystery of electricity has not yet been solved. A great number of its effects are known, but nobody can tell whether it is a subtle fluid or merely a change of condition. The Maryland court of appeals has just decided a case that will be of great value in solving this question; that court decided that a plant for the production of electricity is not a manufacturing establishment in the meaning of the law. But the question was decided differently and perhaps more correctly by the New York court of appeals, in 1892. "Passing by the refinements of scientific discussions as to the nature of electricity," said the tribunal, "it would seem to be common sense to hold that a corporation which generates or produces it by the application of power to machinery, and thus obtains a product which it sells to its customers is in every just sense of the term a manufacturing corporation."—*Ohio Legal News.*

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The doctors seem to be having a hard time of it in the British law courts. If they disclose secrets in breach of professional confidence, the Kitson-Playfair case is a warning as to what may overtake them at the hands of a jury, and now we have another picture presented to us in a Scotch case, wherein the consequences of being loyal to professional honor were disastrous. It appears, according to English exchanges, that the doctor, in the case in question, was insured under an accident policy covering *inter alia*, blood poisoning. In operating on a female patient afflicted with syphilis he scratched his finger, and blood-poisoning ensued. It was clear, according to the evidence, that the injury was within the policy, the doctor's *bona fides* being unimpeachable, but the insuring company demanded to know the name of the patient. This the doctor would not give, his collegiate oath pledging him not to do so, and the court, in consequence, dismissed his claim, on the ground that he had not furnished the evidence required; that is to say, the best evidence. Lord Young, who dissented, observed that, "however candid and credible a pursuer's statements may be, and however much they may be believed and supported by evidence, * * * his claim must be rejected unless he is prepared to do what is confessedly dishonorable, that is, disclose the name of the patient from whom he received the infection." The action of the company appears to have been based on a teehnicality, raised for the purpose of avoiding liability under the contract, in which they have been successful. Perhaps the only thing the physicians can do under the circumstances is to steer clear of this sort of insurance.—*Albany Law Journal.*

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The taxation of the insurance business by the state as a general proposition is quite proper and legitimate. It is right that insurance companies should contribute something to the revenues of the commonwealth for the privilege of doing business there, as other

lines of business do, but there is no good reason why this should be made burdensome or excessive. Were this made sufficient to pay the expenses of the insurance department, with possibly a small margin "for profit," it would be all that common business sense could rigidly ask for, but when taxes are made so heavy that they yield a large revenue over and above all expenses of supervision they go beyond the bounds of common sense. Take Michigan, for an illustration. The receipts of the insurance department last year amounted to $213,451.21 and the disbursements to but $10,285.63, leaving a balance to profit account of $203,165.58. The bulk of this large revenue was for the privilege exacted of them of giving indemnity to the citizens of the state. And yet we find in the face of these large returns efforts made at every session of the legislature to increase the rate of taxation. It would appear from these persistent efforts as though there were a determination on the part of the law makers to compel the companies to pay out in the state in losses, expenses and taxes as much as they receive in premiums from its citizens, and as though they would not rest content until they had established that result.

But there is a question involved in this which the would-be protector's of the people's interests entirely overlook, and that is who really pay the taxes? Why the companies, of course, say the law makers, but do they? Theoretically, yes, but practically they do not. The capitalists who have their money invested in these corporations are not thus risking it for fun. They must have a fair margin of profit on their invostment or the company is retired. It follows then as a logical conclusion that there must be a premium income sufficient to more than offset all losses and other expenditures or the company cannot continue to do business. Hence in Michigan, for example, there is but one of two things to be done, either to withdraw from the state or make the premium rates adequate to meet the necessities of the case. So these excessive taxes which yield so large an income to the state are after all paid by its citizens in their premiums, and a heavier tax means a larger rate. In the case of life insurance companies which have a fixed premium this tax levy is offset by reduced dividends to the policy-holders, so the result is practically the same; it comes out of the pockets of the insured.

It is the people then who are contributing out of their hard-earned funds to the profits of the insurance departments, and to increase its revenue by increasing taxes would be simply to add to the burdens of the people. There is a great cry these days for reduced rates and in the reduction of taxes and other excessive burdens laid upon insurance companies lies the only sure pathway to this desired end. If Michigan legislators really wish to reduce the burdens of the people insurancewise, they can easily accomplish it by reducing taxation of the insurance business, but if they wish the citizens to contribute $200,000 annually to the state treasury they have only to continue the present plan.—*The Indicator and Journal of Insurance.*

## RECENT MICHIGAN DECISIONS.

CHANCERY PRACTICE—PROPER PARTIES.—In a bill filed to restrain the trustees of a church from closing the church building against the regularly appointed pastor, it is held, that complainants having shown that they represent the regularly organized body of the church and are its regular appointees are entitled, under the former decision in this case reported in 102 Mich., 357, to the relief prayed.—*Fuchs* v. *Meisel.* July 13, 1897.

DISCONTINUANCE OF SUIT—SETTLEMENT—EFFECT.—Plaintiff having a claim against defendant took a promissory note, on which defendant was an endorser, as security for its payment, upon non-payment of the note it was not protested, but suit brought upon it, which plaintiff stipulated to discontinue upon condition that the defendant execute a new note. Defendant failed to do so and plaintiff brought this action, and it is held, that the settlement of the former suit was not a bar to his recovery.—*Levy* v. *O'Leary.* June 28, 1897.

EQUITY PRACTICE—RE-OPENING CASE—FORMER ADJUDICATION A BAR.—A judgment having been obtained upon a policy of insurance which judgment was affirmed by the supreme court, the company filed this bill claiming that the insurance policy and judgment are void inasmuch as a note secured by a mortgage covering the insured stock was in the hands of a third party at the time the insurance was effected, which fact was not disclosed and of which the company were ignorant at the time the judgment was secured; and that the note and mortgage are void because of fraud practiced upon the insured by the holder, and it is held:

That a mere allegation by the company that a fraud has been committed and that it can now establish the fraud on a retrial, when it appears from the record that the question of the same fraud was raised in the former trial, will not authorize a court of equity to interfere, after the judgment against the company in the court of law has been affirmed by the highest tribunal.

Generally, courts of equity do not permit cases to be retired therein which have already been disposed of in courts of law, upon the very point made by the bill.—*Farmers' Fire Insurance Co.* v. *Johnston, et al.*

FRAUDULENT CONVEYANCE—UNDUE INFLUENCE—EVIDENCE.—A conveyance of property made practically without consideration by one who is weak in mind, but not mentally incompetent, and who was influenced to make the deed by the fear that unless he did so he would lose his property, will be set aside by a court of equity.—*Landis* v. *Smith.* June 28, 1897.

NEGLIGENCE—ATTACHMENT OF ELECTRIC WIRE TO BUILDING—NOTICE OF DEFECTIVE CONDITION OF BUILDING.—In an action brought to recover for injuries received by the falling of a cornice alleged to have been caused by the negligence of the defendant in attaching thereto a heavy wire, it is held:

1. An objection that inasmuch as the declaration counts only on a dead wire, the court was in error in submitting to the jury the question of negligence in placing and maintaining the wire if it was a live one, is without force, the jury having found, in answer to a special question, that the wire was a dead one.

2. The question as to whether or not defendant maintained the wire, as contended by plaintiff, was a proper one for the jury to pass upon.

Irrespective of the fact that the city ordinance forbid the stringing of such wire, it was negligence for the defendant to attach the were to the cornice if the danger was apparent.

3. Knowledge on the part of the defendant's employees who strung the wire, that the building and cornice were in an unsafe and defective condition was notice to the company of the apparent defects.—*Swanson* v. *Menominee Electric Light, Railway & Power Co.* July 13, 1897.

PARTNERSHIP LAW—DISSOLUTION OF PARTNERSHIP—NOTE GIVEN BY PARTNER AFTER DISSOLUTION OF FIRM.—A partnership is dissolved when it ceases to do business for which it was organized.

The partner who is intrusted with the settlement of partnership affairs is not authorized after the dissolution of the partnership to give notes in settlement of partnership debts in the absence of authority conferred upon him by the other partners to do so.—*Potter* v. *Tolbert.* June 28, 1897.

RECEIVER—AGREEMENT TO PAY CLAIM—CONSIDERATION—ENFORCEMENT OF AGREEMENT.—A receiver appointed to wind up the affairs of an insolvent corporation could not of his own motion and without consideration agree to the existence of a lien claimed by the municipality for unpaid taxes, and give it preference over creditors.

An agreement made by a receiver with the municipality to the effect that if the city would forbear from levying on the goods in his possession so that a sale of the stock could be consummated, he would retain a sufficient amount to meet the claim of the city, is enforceable.—*Union Trust Company* v. *Mabley & Company.* June 28, 1897.

REPLEVIN—BOND—WAIVER.—Section 8374, Howell's Statutes, providing for the filing of a bond by plaintiff in replevin, must be construed in connection with sections 7770 and 7771, authorizing an amendment to the bond.

The failure of plaintiff to file a bond as required by sections 8374, will not work a discontinuance of the case where the defendant has waived the giving of the bond by failure to except to the bond given, or to any proceedings in the cause.—*Bublitz* v. *Trombley.* June 28, 1897.

TRUST—CONVEYANCE BY WIFE TO HUSBAND IN PURSUANCE OF PATROL TRUST—EFFECT AS TO CREDITOR OF TRUSTEE.—An agreement between a husband and wife to the effect that land purchased by the husband, the title to which is placed in the wife, shall ultimately be transferred to both as joint tenants, is valid.

A conveyance made by the wife, in pursuance of such parol trust, to the cestui que trust, before a lien attached to the property could not be attached by creditors of the trustee.—*Desmond* v. *Meyers, et al.* June 28, 1897.

VENDOR'S LIEN—SUBSTITUTION OF NEW NOTES—WAIVER OF LIEN.—Certain real estate was sold upon contract by a husband and wife, a promissory note being given for the purchase price. One of the vendors died, making the survivor sole legatee, and a new note was given by the vendees to the survivor. The note not being paid, a bill was filed praying that a vendor's lien might be decreed And it is held, that inasmuch as neither of the vendors had either expressly or impliedly waived or discharged the lien, a decree should be entered.—*Curtis* v. *Clarke.* June 28, 1897.

WILL—ELECTION OF WIDOW—TERMINATION OF LIFE ESTATE—PAYMENT OF LEGACIES.—A testator, by his last will, gave his wife a life estate in all his real and personal property, and provided that after the death of the wife, his real estate should be sold for the purpose of paying "the legacies hereinafter bequethed," and it is held, that the election of the widow to take under the law and not under the will, terminated her life estate, and that estate having been terminated, the property should at once be distributed.—*In re Schultz Estate.* July 13, 1897.

## CURRENT LITERATURE.

The July number of *Appletons' Popular Science Monthly* contains a thoughtful article on "The Principle of Economy in Evolution," by Edmund Noble. The author shows that the whole of evolution, viewed apart from its secondary processes, may be summed up in the simple formulæ—movement in the direction of least resistance. "Some Facts about Ants, Bees, and Wasps," is an interesting account of these three representatives of the *Hymenoptera*, a family thus named by Linnæus because of the curious connections between the wings during flight. The paper hornet (*Vespa maculata*), whose curious nest is so famous with the schoolboy as a target, is among the individuals described. No. VI of Prof. Kipley's articles on the "Racial Geography of Europe," is devoted to France. Several reasons combine to make this the most interesting country of Europe from the anthropological point of view. It not only presents the greatest diversity of climate, soil, and fertility, but it also contains representatives of all three of the great ethnic types, while most countries are content with two. The curious psychological conditions dominating the mob are discussed by Prof. E. A. Ross. He shows that a crowd, even an excited crowd, is not a mob. Great mental instability marks the true mob, and this characterizes only the crowd that is under the influence of suggestion. Saturn, so much feared by the ancient astrologers because of its supposed malign influence on the world, and now receiving the special attention of astronomers because it preserves to us a probable type of the plan on which all the worlds were originally made, is the subject of an instructive paper by Clifton A. Howes. The whole number is full of interest.

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While three short stories of unusual merit are a distinct feature of the July *Atlantic*, still this issue contains aside from excellent fiction articles of permanent interest and value. Professor Woodrow Wilson, of Princeton University, contributes an article upon "The Making of the Nation," and asks the perplexing question, What is Americanism? Another political paper of importance is by E. L. Godkin, Editor of the Nation, on "The Decline of Legislatures." He traces the development of legislatures, and shows how in all parts of the world there has been a startling decline in the dignity of legislative bodies.

Following other studies of Rural New England, Alvan F. Sanborn, who has made a specialty of this subject, writes interestingly of social conditions in a decaying New England town. A distinctly literary flavor is added to the issue by the printing of hitherto unpublished letters of John Sterling and Emerson. Edward Waldo Emerson edits them and adds an interesting sketch of the cheerful and heroic Sterling. Kate Holladay Claghorn writes on Burke; and this review, coming on the one-hundreth anniversary of the great statesman's death, is particularly timely. She discusses his work and character and its relations to American history. Professor W. J. Ashley, of Harvard University, makes the recently published life of Jowett the text for an article of unusual interest on Jowett and the University Ideal. Incidentally Professor Ashley gives a comparative study of English and American university work and ideals.

Alice Choate Perkins contributes a sonnet of unusual quality called "A Day in June," and Olive Thorne Miller prints another of her charming studies of birds and out-door life entitled "The Stony Pathway to the Woods." The reviews of this number are on Strauss and James Lane Allen.

# MICHIGAN LAW JOURNAL.

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## *PROGRESS IN THE LAW DURING THE VICTORIAN ERA.**

JESSE HOLDOM OF THE CHICAGO BAR.

At this time when the English speaking people all over the world are celebrating the Queen of England's remarkable reign, exceeding in years that of any of her predecessors and marking a progress in civilization unknown to any other era in the world's history, it is not unbecoming in a legal body such as this in a city coincident with the Victorian era, in a state whose existence as such, is less than one year more than that of the life of England's Queen to take a short retrospective view of things pertaining to our profession during that time.

Lord Cottingham was Lord Chancellor at the Queen's accession, but on the formation of the first new ministry of the new Sovereign in 1839 she appointed Lord Lyndhurst Lord Chancellor, who by the way was born in Boston, Massachusetts, May 21, 1772, being a son of John Singleton Copley, the artist, and his wife, Susannah Farnum Clarke, both of whom were natives of Boston. He was descended through his mother from that Mary Chilton who came over in the Mayflower in 1620; his paternal grandfather was the consignee of the teas which were thrown into the sea at Boston, December 16, 1772, by citizens disguised as Mohawk Indians, this being Boston's

* An address delivered before the Illinois State Bar Association, July 2, 1897.

to this end, and long before any steps had been taken in England toward legal forms Field was actively at work among the lawyers, and the legislators of New York in an attempt to bring about a codification of the state laws, and his efforts finally culminated in the code of 1848, the first of its type adoped by English speaking people. This great lawyer never ceased actively on these lines, he was energetic and aggressive in their propagation until the end of his long and remarkably brilliant career. Thus the United States was the forerunner of the reforms of the law among the people of our native tongue, and to the credit and lasting glory of Field and his deep legal learning be it remembered that in many fundamental and practical principles the Judicature Act of England is not only analogeous to but is an adoption of the New York Code compiled by this eminent American lawyer.

The marvelous and unprecedented growth of the law in its extension and application of the writ of injunction and the keeping in motion of the wheels of commerce by operating public and private corporations by courts of equity through receivers, now so common, was almost unknown at the commencement of this era. In the van on these branches of the law we find one of our countrymen, a gentleman of the Illinois Bar who has for many years practiced his profession in Chicago. James L. High's works on Injunctions and Receivers were in their broad scope and deep analysis pioneers. No better works have yet been written on these subjects; they are equally as eminent authority in the equity branches of the English courts as they are in the courts of our own city and state: another instance of the abundant resourcefulness and originality of our active American talent.

Another extraordinary and well defined evidence of the growth of, civilization among the English and American nations, is the fact notwithstanding the independence of our country was wrested from England at the point of the bayonet and the mouth of the cannon little more than 120 years ago, the spectacle is revealed of the two countries dwelling together in amity and settling their differences by arbitration; keeping alive an intercourse of friendly commerce and interchange of social amenities second to no other nations under the sun. The visits to these shores of Lord Chief Justice Coleridge in 1879, and the visit last year of Lord Chief Justice Russell of England with messages of kindly greeting and fraternal interest in our common welfare are incidents of the greatest moment, attesting the depth and genuineness of the regard which the mother country

bears toward us, and in itself is the highest type of the most advanced civilization. Remembering that the English Episcopal Church is a part of the government of England, that its bishops are legislators with seats in the House of Lords, behold the spectacle of the bishops of the Protestant Episcopal Church of our country now in conventional session with the highest dignataries of the English Church in London presided over by the Primate of all England—the Archbishop of Canterbury—taking counsel and advice about those things of a religious character in which both churches are so much interested, striving together to devise ways and means for fostering and upholding the brotherhood of man, and ameliorating the conditions social and spiritual of the poor, the unfortunate and the cast down. Could more demonstrative proof of the unity of the feelings and regard of these two countries for each other be well conceived?

The most cordial, friendly letter from the President to the Queen of England on the completion of her sixty years of imperial sway over the British people, on the celebration of her Diamond Jubilee only a few days ago, I am quite sure voiced the sentiments of our fellow-countrymen as well as that of the head of the government, and was but another incident tending in the same direction.

In the matter of international arbitration the two great English speaking nations have set a most lofty and enduring example, by practice as well as by precept. We have arbitrated our own differences from the Alabama claims growing out of the war of the Rebellion to the seal fisheries dispute in which one of our most honored citizens, an ex-federal judge, took a most important and active part. After the speech on international law and arbitration made by Lord Chief Justice Russell at Saratoga last year, which was a most exhaustive and profound treatise upon the subject, delivered in a friendly and most impressive manner, the effect of which on those who were fortunate enough to hear it will never be forgotten, followed as it was by the treaty of arbitration proffered by England, approved by President Cleveland and nullified by the honorable senators' failure to second the action of the President, seems for the time being a great opportunity for international good, lost; but it requires not the spirit of prophecy to fortell that at no very distant time, if not this treaty, another of similar import and as far-reaching for good, will be agreed upon between us, setting an example by which the world will finally be guided, for in the language of Lord Chief Justice Russell, "who can doubt the influence they possess for ensuring the healthy progress and peace of mankind?

But if this influence is to be fully felt, they must work together in cordial friendship, each people in its own sphere of action. If they have great power they have also great responsibility. No cause they espouse can fail; no cause they oppose can triumph. The future is in large part theirs. They have the making of history in the times that are to come. The greatest calamity that could befall would be strife which should divide them.

While international arbitration is an outgrowth of the civilization of the 19th century, yet arbitration between nations has in practice been resorted to from ancient times, it being recorded in history that Archidamus, King of Sparta, declared "that it was unlawful to attack an enemy who offered to answer for his acts before a Tribunal of Arbiters." The Popes of the Romish Church, and rules of Empires have from ancient to modern times frequently lent their good offices in settling disputes between nations, thereby averting war. Since 1815 some sixty instances of effective international arbitration are recorded, to thirty-two of which our country has been a party, and Great Britain to about twenty. Arbitration causes in these latter days are oftentimes inserted into treaties. Our country was the very first to adopt this method and set an example in this regard to the world by inserting an arbitration clause in its treaty with Mexico in 1848, since which many other countries have followed our example. Notwithstanding our leading in this forward movement, yet we refused to join in the declaration at Paris in 1856 for abolishing privateering, being the only great power refusing adhesion thereto. Our reason, however, was that its terms were not sufficiently broad to suit our ideas on the subject; the practical result of which is that we are at liberty to follow the abomination of privateering wherever we deem we have just cause or sufficient provocation.

By way of illustration of the changes in the law operating on new conditions and inventions, as applied to commerce, take the telegraph and telephone. They are brought within the law applicable to common carriers; as lawyers, of course you are well informed as to the rules of law governing their operation.

Conversations over the telephone are admissible as evidence with certain qualifications as to their weight and effect. An acknowledgment of a deed by a married woman, made over the telephone to a notary three miles away, was upheld by the supreme court of California after full presentation by eminent counsel seeking to avoid it, at the instance of the woman making the acknowledg-

ment. (*Banning* v. *Banning, 80 Cal., 271.*) Telephone companies are treated by the courts as common carriers of news, and are required to furnish telephone facilities indiscriminately to all applicants on complying with all just regulations. The supreme court of Nebraska laid down the principle (in *State* v. *Neb. Tel. Co., 17 Nebr., 126*) that the courts keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse and its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad and from the railroad to telegraph and from the telegraph to the telephone, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. Can we lawyers fully subscribe to this very glowing account of the progress and adaptability of the law?

What a change has been wrought by steam and telegraph and telephone in the administration of the law! In 1837 the courts in Illinois traveled to the people, making weary journeys on horse-back, suffering from the crudeness of civilization and the wilderness-like character of our state. From the log house, hotel and court house, with its wandering judiciary and lawyers, we have stationary courts; a supreme court that at last has ceased wheeling itself around and has found a permanent home—thanks to the energy and never-give-it-up qualities of our worthy President—in that beautiful state house in the capital city of our commonwealth; now every county seat is supplied with a good court house and ample accommodation for the successful dispensing of law and justice. Where a copy of the statutes was the only law book obtainable, now modern libraries of reports and text-books can be found. The scenes have changed since then. The mortals of that day have long since put on immortality and gone to their final reward.

Abraham Lincoln, Illinois' most illustrious son, first entered the state legislature as a member of the Lower House, in the year 1837. Stephen A. Douglas. the little giant in debate, and afterwards United States senator from Illinois, was just crossing the threshold of a brilliant political career. Judge David Davis, Judge Thomas Drummond, Abraham Lincoln, Stephen A. Douglas, Stephen T. Logan, John T. Stuart, U. F. Linder, O. H. Browning, Edward D. Baker, Lyman Trumbull, James Semple, Thomas Ford, Sidney Breese, Nathanial Pope, Ninian W. Edwards and O. B. Ficklin were then young lawyers of Illinois, all of whom became famous either as politicians or judges.

Since 1837 there have been many changes in the personnel of the legal profession in Chicago; then a dozen lawyers could not be found; now 4,000 or more are accredited as pursuing their profession here. The less than a dozen lawyers had a population short of 4,000 persons to look to for clientele, while the Chicago lawyers of to-day, more in number than the whole population of 1837, have in the vicinity of two millions of people as a never-failing source of fees and employment.

Can it be said that the advance in civilization, caused by steam and electricity being applied to the wheels of commerce, are met by an advancement in the laws sufficiently rapid to keep pace with the changes wrought thereby, and followed by modern inventions and the up-to-date methods of the world's commerce, or are we still open to the charge often made that the administration of the law is one hundred years behind the times?

Is Illinois in the van or rear guard in legal matters? Are her courts keeping step to the music of advancement in these material things? Is she abreast of her sister states in these matter, or is she, with her emasculated system of half Common Law and half Statutory Law, the latter so modifying and changing the Common Law as to work confusion, behind the states of code practice and practice formulated by the Judicature Act of the mother country, or not?

As a nation are we abreast of the Victorian era of advancement, with the laws of descent, distribution of estates, conveyancing, tenure of real property, marriage, divorce, promissory notes and bills of exchange, different in the separate states of the Union between which interstate commerce is constantly prosecuted and commercial transactions of fabulous dimensions regularly occurring between them and foreign countries? Will we be practically abreast of the times in which we live until there is equality and uniformity of laws on these and other important subjects throughout the whole of the states forming the great federation which we delight to call "Our Country"? Are we putting ourselves in a position to command the best trade advantages and the respect and confidence of the commercial world, until we arrive at some uniformity on these varied and vital legal subjects? To-day we stand at the close of the greatest era of civilization. We live in times of kaleidoscopic change and invention. Representing as we do the greatest of all the professions in which are vested the lives, the liberty, the property and the very happiness of the people, may we maintain the honor, the integrity and the ascendancy of our profession in the future as in the past; may the times yet to come, in the era succeeding the great Victorian era, so lately celebrated, find our profession ever rising equal to its great opportunities!

## *CONTRA PROFERENTEM.*

It is an ancient maxim of law in the interpretation of deeds that *verba chartarum fortius accipiuntur contra proferentem;* or, *quælibet concessio fortissime contra donatorem interpretendum est.* Like all maxims, these are elliptical, assume a vast amount of learning and reasoning, and themselves require interpretation. Perhaps the clearest and truest exposition of the rule is that given in Elphinstone on Deeds (*a*), where it is said, "This rule is often misunderstood. It does not mean that the words are to be twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they were used, we must take them in the meaning most disadvantageous to the person who uses them, unless the adoption of that meaning would work wrong."

The authority of the rule has been much shaken by a dictum of Sir George Jessel's in Taylor v. Corporation of St. Helen's (*b*), where his Lordship said, "I do not see how, according to the now established rules of construction, as settled by the House of Lords, in the well-known case of Gery v. Pearson (*c*), followed by Roddy v. Fitzgerald (*d*), and Abbott v. Middleton (*e*), that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot

*a*) Rule 21.
*b*) 6 Ch. D. 270.
*c*) 6 H. L. C. 61.
*d*) 6 H. L. C. 823.
*e*) 7 H. L. C. 68.

find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favor of the grantor, for the grant is annulled." It is our present purpose to examine this dictum and the proposition it lays down, and ascertain how far it is justified by the cases upon which it purports to rest, the principle of the dictum itself, the result of its application and how far it is a workable rule. We know of no case in which the maxim, being strictly applicable, has been rejected on account of this dictum, but is so frequently cited as authority for its rejection that we hope the enquiry will not be without benefit.

In the first place, as it professes to rest upon the authority of the House of Lords, it is well to examine the cases decided by the House in order to see whether that august body gave any indication of an intention to reverse or abrogate such an important, and to all appearances, necessary maxim.

The three cases cited by the Master of the Rolls were all cases for the interpretation of wills; and, as the maxim never was, nnd never could be, applied to the interpretation of a will, the first thought that arises is that the House of Lords never had the maxim in mind at all, and therefore never could have intended to abrogate it. The principle underlying the maxim is, that after a man has made a deed he shall not derogate from it by interpreting ambiguous words in his own favor, so as to enable him to retain part of the subject matter of the grant rather than be deprived of it by interpreting the words against him—a principle entirely out of place in the interpretation of wills, and the statement of which, if correctly stated, ought to dispose of the matter. The second thought is, that in the interpretation of wills, a dictum respecting the interpretation of deeds would necessarily be obiter dictum, unless the canon of interpretation under discussion was common in its application to both kinds of documents. But it has been said, "if there is any difference between a deed and a will in cases where the instrument admits of two constructions, the deed is to be taken the more strongly against the grantor" (*f*). Nothing is to be found in any of the three cases cited expressly referring to the maxim, which is peculiar in its application to the deeds as distinguished from wills, and it therefore becomes necessary to examine the cases further and ascertain whether, by necessary inference, anything is laid down which is so inconsistent with the application of the maxim to deeds

(*f*) Per Lord Abinger, C. B., Stephens v. Frost, 2 Y. & C. Ex. at p. 309.

that the House would be precluded hereafter from applying it if the appropriate case should arise.

In Grey v. Parson, the question was as to the meaning of the phrase "die under twenty-one and without issue," as affected by the context. The following are the only general rules referred to:—Per the Lord Chancellor, at p. 78, "Adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and give to these words their natural ordinary meaning, unless, by so doing it appears from the context, that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or unless, by so using them, you would be doing something which would manifestly lead to an incontistency," etc. To the same effect Lord Ellenborough is quoted, at p. 85. Per Lord St. Leonards, at p. 91, "Words should be received in their natural grammatical import, and effect given, if possible, to every word in the will." Repeated at p. 99, with the addition that if by so doing the intention is defeated, the rule is to give the words such a natural construction as will effectuate, and not defeat, the intention. Per Lord Wensleydale, at p. 106, in construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument," etc. So far there is not a hint at anything like the maxim, the sole proposition being to find the intention, first, by taking the ordinary meaning of the words; but, secondly, if that produces inconsistency or absurdity, or manifestly defeats the otherwise evident intention, by adopting some other natural meaning. The idea of ambiguity, in the sense that the words exactly consist with two diverse and irreconcilable meanings, is entirely absent.

In Roddy v. Fitzgerald, the question was whether "issue" meant "heirs of the body" or "children." The opinion of the Judges was taken, and Baron Watson said, at p. 843, "From the use or misuse of legal terms, it frequently happens that an apparent intention cannot be given effect to according to the rules of law affecting the limitation of estates. And again, words are capable of being construed in two senses. It is for the court to say in what sense the testator's intention would be best fulfilled." He then goes on to refer to the rule as to general and particular intent. It is noticeable here, that there is a distinct reference to words capable of being construed in two senses, but not the slightest reference is made to the maxim. Indeed, one cannot for a moment imagine the application

of the maxim in a case in which a testator has used ambiguous language. There is nothing further in the judgments in this case, except that the House and the Judges gave expression to the truism, that the duty of a court is to find out the intention of the testator.

In Abbott v. Middleton, the question was as to the meaning of the words and phrases "but," "dying," "without issue." Lord Wensleydale, at p. 114, repeated the rule as to reading words in their ordinary grammatical sense, and, at p. 116, he pointed out that this involved no inconsistency or repugnance in any part of the will. There is nothing else that can be quoted from this case which in any way bears upon general rules of interpretation.

It appears, therefore, that there is nothing in the House of Lords cases which is new, for, in the first place, it is a truism to say that the court endeavors to find out the intention of the maker of the instrument, whether deed or will; and, in the second place, it is not new that in the process of interpretation words are to be taken in their ordinary grammatical sense unless the result is to produce repugnancy or inconsistency with the rest of the will, or to defeat an intention otherwise manifest. Remarks are sometimes made at the present time touching upon the duty of the courts in every case to ascertain the real intention of the maker of the instrument, as if that had not been the course of procedure in ancient times. And indeed Sir George Jessel's dictum itself may be so read as to bear a reproachful meaning.

Let us now examine the dictum on its own merits. After stating that the maxim cannot be considered as having any force at the present day, his Lordship proceeds to say, "The rule is to find out the meaning of the instrument." Pausing there, is there anything in that principle that is new, or inconsistent with previous decisions? Have not the courts always endeavoured to find out the meaning of the instrument? But in many cases the court feels bound, for the security of titles which depend upon particular use of language, sometimes to find a meaning which they regretfully say is not the actual meaning of the testator though it is plainly his expressed meaning. Indeed in Abbott v. Middleton, Lord Wensleydale quotes from Fearne (p. 173), "that it is better that the intentions of twenty testators every week should fail of effect than that the rules should be departed from, upon which the security of titles and the general enjoyment of property so essentially depend" (*g*). Again, the House

*g*) 7 H. L. C. at p. 114.

of Lords, in Smith v. Cooke (*h*), protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would, or might, or perhaps ought to have intended when they began to frame their instrument (*i*). Now, if the House of Lords had intended to lay down the rule that the apparent or conjectural intention should prevail over the expressed intention, or that the intention generally should prevail, Lord Wensleydale would not have quoted and followed the passage from Fearne; nor would the House subsequently have so rigidly adhered to the principle of leaving conjecture, however probable, to the winds, and adhering strictly to the sense of the language. The opportunity was presented in Abbott v. Middleton of refusing to defeat the testator's intention by a rigid adherence to the words regardless of consequence, but it was not embraced. We are, therefore, unable to see anything new in Sir George Jessel's assertion, that the rule is to find out the meaning of the instrument. In fact, it requires qualification in the sense that the testator may defeat his own intention by the use of inappropriate language.

He goes on, however, to say that that is to be done "according to the ordinary and proper rules of construction." What are the ordinary and proper rules of construction? For wills and for deeds they are entirely different. A set of rules for the interpretation of wills would do us little good in interpreting deeds—and vice versa. And it is neither expressed in, nor can it be inferred from, the language of the Lords in the three cases, that the rules for the interpretation of deeds were thenceforth to be varied. The Master of the Rolls' qualification adds nothing to the aphorism. Presumably, when an instrument is up for interpretation, there is something obscure, doubtful or ambiguous in it, and rules of construction have, of necessity, to be applied. But again, what are the ordinary and proper rules of construction? No doubt, the qualification is pregnant with the denial that the maxim under consideration is proper. But, adopting the rule so often referred to in the House of Lords cases, that the words are to be used in their ordinary and grammatical sense, does that show that the maxim is not a proper one? There are obviously cases in which the adherence to the ordinary grammatical use of language will not solve the difficulty. Indeed, even the rule referred to is qualified, because the ordinary

*h*) L. R. [1891] A. C. 297.

*i*) See also, and compare Carroll v. Provincial Nat. Gas Co.. 26 S. C. R 181.

use of the words may produce an absurdity, an inconsistency, or a repugnancy, as pointed out by all the Lords. Then it is not a final rule. It is only a help by the way. It was not found sufficient in Taylor v. Corporation of St. Helen's, for a good deal of technical knowledge was displayed by the Master of the Rolls in ascertaining what passed by a grant of the "watercourses, dams, reservoirs," etc.

His Lordship goes on to say, "If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty." Now, if we can instance a case in which, by taking the ordinary and grammatical sense of the words used, and giving to technical words their technical meaning, we still find an ambiguity, are we to adopt the dictum, reject the maxim, and say the grant is void for uncertainty? Or are we to apply the maxim, as one of the "ordinary and proper rules of construction," and make the grant effectual rather than allow it to perish? The rule itself implies that all other reasonable means of finding out the meaning have been resorted to, and yet an ambiguity remains. To adopt the dictum would be to abrogate also the maxims that a man shall not derogate from his own grant, and that a deed should be maintained rather than perish. The ordinary and simplest instance of the application of the maxim is that given by Blackstone (*j*), citing from Coke, "also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life of the grantee; in case the grantor hath authority to make such a grant; for an estate for a man's own life is more beneficial and of a higher nature than for any other life, and the rule of law is that all grants are to be taken most strongly against the grantor unless in the case of the king." Now in this case, giving due effect to all the words, we arrive at nothing more than that an estate for life is to pass. But there are several kinds of life estates—an estate for the life of the grantor, or that of the grantee, or for that of a third person. As no cestui que vie is mentioned, we dismiss that. But the grant is still ambiguous. Is is to be for the life of the grantor or for that of the grantee? Will the ordinary and grammatical sense of the words lead us to the truth? Have we exhausted all the ordinary and proper rules of interpretation? And are we to hold the grant void for uncertainty, and so interpret it in favour of the grantor? Is the deed to perish? Clearly not. Then is the grantor to be al-

*j*) 2 Comm. 121. The rule is now altered by R. S. O. cap. 100, sec 4., sub-sec. 3, in the case of a grant at large.

lowed to belittle, or derogate from, his grant, and under ambiguous language to claim that it is less than the grantee would have by his interpretation? Or, is he to be entitled to say that, as it is uncertain it must be void, and the land revert to him? If we take the grant most strongly against the grantor, then, in Blackstone's words (*k*), "hereby all manner of deceit in any grant is avoided, for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them."

If Blackstone's rule, cited from Coke, is correct, then we have a case in which no rule of construction other than the maxim in question will avail to give an accurate meaning to the deed. Put the dictum of Sir George Jessel alongside of Mr. Elphinstone's explanation of the maxim, and we shall see that no other maxim will act as a guide to a solution. It is after every device has been resorted to, and done nothing more than leave us with a word or words having "properly two meanings," that the maxim is to be resorted to; and when one of those proper meanings is for and the other is against the grantor, then the maxim becomes applicable, and the deed is taken "most strongly against," that is, in that one of the two proper meanings of the words which is least favourable to the grantor.

Any other course would be one of very dangerous policy. The only course suggested by the Master of the Rolls is to hold the deed void. This is favouring the grantor with a vengeance. Suppose in the case of a grant of an estate for life generally, the court should say that as the words in their proper use are uncertain, the grantee shall take nothing; what a premium upon that deceit of which Blackstone speaks! Why not say, the deed shall not perish at any rate, and the grantee shall take as much as he justly can? We feel bold enough to say that if a court could find its way to giving anything by an ambiguous deed, it would do so rather than hold it void. But, to give the least it could, would only be to favour the person who used the ambiguous language as much as possible without rescinding the whole transaction. It would be a matter only of degree and not principle.

It merely remains to say that the maxim itself is not founded upon anything peculiar to deeds, but upon that principle of self-interest which makes men careful not to go beyond their own inter-

*k*) 2 Comm. 380.

ests in the use of language, and upon the policy that a man shall not be allowed to deceive by the use of ambiguous language. So we find that in pleading, when that was of importance, a pleading, if susceptible of two meanings, one for and one against the pleader, was always taken in the meaning more strongly against the pleader.

And in construing conditions of sale, the same principle has been so long, so consistently and so justly applied against the vendor, that it would astonish one to hear that it has been improperly used.

It is difficult, indeed, to conceive that there was any intention in the House of Lords of in any way interfering with a most wholesome principle, and certainly it is difficult to find either the intention or the justice of such an intention, even with the aid of Sir George Jessel's dictum.—*Canadian Law Times.*

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## *NOTES.*

The American Bar Association will hold its twentieth annual meeting at Cleveland on August 25th, 26th and 27th. The president, James M. Woolworth, will deliver his address on Wednesday morning. On the following day John W. Griggs, governor of New Jersey, will deliver an address. Other papers will be read as follows: "Constitutional Construction and the Commerce Clause," by Robert Mather of Illinois, and a paper on "The Present Scope of Government," by Eugene Wambaugh of Massachusetts. Besides these an exceptionally fine programme has been arranged in what is known as the Section of Legal Education, during the session of which the following papers will be read: "Primitive Legal Conceptions in Relation to Modern Law," by Henry E. Davis, of Washington, D. C.; "The Law of Insurance in the Law School," John A. Finch, Indianapolis, Ind.; "The Wage of Law Teachers," Prof. Charles N. Gregory, Associate Dean of the College of Law of the University of Wisconsin, Madison, Wis.

In our department of legal miscellany will be noticed a short clipping from the London, (Eng.) Law Journal, commenting on the policy of examining prisoners while in confinement, and criticising this action on the part of the police. Further the item states that one of the judges has heartily condemned the practice, and suggests that evidence so obtained should not be received so readily by the courts in the trials of accused persons. The judge states that the

practice is more in line with the French system of criminal practice than that of the English. The powers and conduct of the police in America have often given occasion for criticism, and in this particular regard we are as faulty in practice as our English cousins. It was only recently here in Michigan that a confession was reported to have been received by a detective disguised as a Catholic priest, and some of the newspapers commented on the shrewdness displayed. The story was afterwards denied. It would seem that the powers of police here and elsewhere have gradually been extended, and functions previously never contemplated as a part of the police power are now recognized as not uncommon and as legal. This usurpation is not remarkable. All departments of government seem to be making a little progress or, viewed in another way, a like retrogression. Take the judiciary department, for instance. Our courts by use of the writ of injunction have gradually extended their jurisdiction, until now there are few departments of industrial life or combinations entered into by workingmen which are not in large measure controlled, modified, or even set aside by them. The action of courts too in declaring so many acts of the legislature unconstitutional, while not in theory an extension of their powers, for it is one of the necessary functions of courts, yet in practice this word "unconstitutional" is made to set aside many statutes for mere policy's sake, as an examination of the cases will show.

Whether these extentions of powers are making for good or evil, whether we are viewing progress or retrogression, only time will show. History will see results and harmonize them where we can see only accidents and unconnected facts and incidents. The examination by the police of persons accused of crime while the latter are in custody is surely not an unmixed evil, and in many ways the practice is a good one. The criminal here has more than an even chance of ultimate escape from punishment for crimes if he only has money enough. Any narrowing of police powers here would make this condition even worse than it now is. Let the future judge this question.

## LEGAL MISCELLANY.

The evil ways of the police die hard. Again and again the judges have pointed out that the police are not entitled to arrogate to themselves a right to question accused persons in private, which is not possessed by judge, jury or counsel at any public hearing of the charge. At Warwick Assizes Mr. Justice Cave again expressed his well-known views on the subject, and stated that he should certainly exclude all evidence obtained by this system of private interrogation, which is more appropriate to French than to English judicial procedure. He believes that most, if not all, of the judges agree with his opinion; and it is full time that the Home Secretary issued general instructions to the police throughout the country on this question, and on another of almost equal importance—the police practice of stripping and searching persons taken into custody irrespective of the nature of the charge or the improbability of any stolen property or weapon being concealed on the person of the accused.—*The Law Journal* (*London, Eng.*)

A more flagrant abuse of the pardoning power which, by the various state constitutions is lodged in the chief executive, than that shown by the official records of the state of Kentucky, has perhaps never been presented. According to the record as compiled and printed by the Louisville Post, the pardons granted by Governor Bradley and by Lieutenant-Governor Worthington, while the Governor was absent from the state, between December 10, 1895, and July 30, 1897, number no less than 675; and this number does not include the pardons given in order to restore the recipient to citizenship. Among those pardoned were thirty-two murderers, who were serving life terms, and sixty-four men who had committed murder and had been convicted of manslaughter, making ninety-six murderers turned loose upon society. Besides these 579 persons convicted of robbery, assault and other crimes were given their freedom. This record would be almost beyond belief but for the reliable character of the newspaper which is our authority. These facts and figures throw a flood of light upon the administration of justice in the Blue Grass State. Such wholesale emptying of the state prisons cannot fail to have important effect in undermining the pop-

ular respect for the laws and their just and orderly enforcement, as well as in rendering life and property still more insecure. The community which demands, or even permits, such mockery of justice to be consummated is in a pitiable condition, and it is little wonder that lynch law rules where the pardoning power is thus flagrantly abused.—*Albany Law Journal.*

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The ordinance imposing a tax upon bicycles and vehicles in the city of Chicago has been held invalid by Judge Tuley, in an informal opinion announced by him from the bench.

The judge holds that court of equity has jurisdiction to enjoin the enforcement of an illegal ordinance.

He held, in substance, that the ordinance was void in that it was not properly a license justifiable under the police power of the municipality, but was in reality a tax for the purpose of raising revenue, under a guise of a license, for the city; that it was unconstitutional in that it was not uniform, being a tax of the same amount on property of different values; that it was a tax upon the property of certain designated individuals or classes, which property had already been taxed under the revenue laws according to its value, and was forced to bear a double taxation.

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A Georgia coroner's jury brought in the following verdict: "The deceased came to his death from a railroad in the hands of a receiver, and the same is manslaughter in the first degree."

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Timid Traveler—"Is this a law-abiding community, my friend?"

Reckless Resident—"Why, say, podner, there's more law abidin' in this community than you've any idee of. There's fourteen lawyers, five judges an' six prosecutin' attorneys, ter say nuthin' uv deputy sheriffs and bill collectors, all planted over in that cemetery."

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The race of special pleaders in England will soon be extinct. The law list for the present year shows that only seven remain; forty years ago there were 109.—*The Washington Law Reporter.*

# BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS LAW—As enacted by the Legislators of New York, Connecticut, Colorado and Florida, from the draft prepared for the Commissioners on uniformity of laws, and the full text of the law as enacted with copious annotations by JOHN J. CRAWFORD of the New York Bar. Published by Baker, Voorhis & Company. Price $1.75.

This book has a more general scope than its title would imply. In 1895, the Conference of Commissioners on Uniformity of Laws, which met that year in Detroit, instructed the committee on commercial law to have prepared a codification of the law relating to bills and notes. The matter was referred to the sub-committee, and that committee employed John J. Crawford of the New York bar, the author of this book, to make a draft of the proposed law. He made a complete draft of the law, with notes. The law so prepared was submitted to the conference which met at Saratoga in 1896, and the commissioners from fourteen different states went over it section by section and made some amendments therein, most of which were such changes in the existing law as the author did not feel at liberty to incorporate into the original draft. The draft so amended was adopted by the conference, and in such form it has been submitted to the legislatures of many of the states. It has been passed and has become a law in the states above named, and the most of the other states will probably enact the same act as soon as the legislatures of the other states convene, so that the law as adopted by those states is likely to become the law of other states, because it is a long way in advance of the statute laws now in force in the various states. It would be of great advantage, could all of the states have the same statute in regards to negotiable paper. International commerce is very great and constantly increasing and uniform laws would make it easier to do business between merchants and bankers of the different states. It would be well for lawyers generally to have this book, not only because it gives the most recent utterance in regard to negotiable paper by references to the laws now in force, and many citations of the most recent cases, but the book would enable the lawyers and legislators to better judge of the changes proposed by it, and also the better to judge whether the changes are more desireable or not. We recommend its careful study, by the bench and bar.

AMERICAN ELECTRICAL CASES, (Vol. VI.)—Being a collection of all the important cases (excepting patent cases) decided in the State and Federal Courts of the United States, from 1873, on subjects relating to the Telegraph, the Telephone, Electrical Light and Power, Electrical Railway, and other practical uses of Electricity, with Annotations, edited by WILLIAM W. MORRILL. Published by Matthew Bender, Law Publisher, Albany, N. Y.

The use of electricity has become so universal for power, light and heat, that it has within the last few years become the subject, either directly or remotely, of an endless amount of litigation. Not only has the litigation been carried on by private individuals and firms to a large extent, but by large corporations. In fact by far the greater part of the litigation has been carried on by corporations. This can be readily seen by a glance at the table of cases reported and the table of cases cited. The practical use of such a series of books, of which this is the sixth volume, can be seen by the most casual observer. Any practicing lawyer, who is an attorney for any manufacturer of electrical instruments, or users of eleetrical apparatus, must have these reports, for so useful and practical have they become, that there is hardly a phase of the law pertaining to electrical subjects that has not been discussed and decided in some one of the six volumes already published. Take as an illustration the case of the Newark Electric Light and Power Company v. Gardner, 6 Am. Electl. Cas. (this vol.) 275, decided by the United States court of appeals, third circuit, Nov. 30, 1896, decided by Dallas, circuit judge. This action was brought in the circuit court for the district of New Jersey by the administrator of the estate of James A. Mason against the electrical company for causing the death of Mason by its negligence. The whole question of negligence of said company was discussed as to the user of poles in common with other companies in stretching and insulating its wires. This case will doubtless fix the law as to such common use of poles. In like manner the rights and duties of users of electricity, and the manufacturer of electrical instruments, and all rights, duties and obligations are discussed, so that this series of reports becomes almost indispensable in briefing and trying a case pertaining to the use of electricity and other topics reported therein.

# RECENT MICHIGAN DECISIONS.

BUILDING CONTRACT—CONSTRUCTION—BREACH OF CONTRACT—SERVICE OF STATEMENT ON OWNER AS REQUIRED BY MECHANICS' LIEN LAW.—Plaintiff entered into a written contract to furnish materials for, and erect five houses to be completed October, 1st, 1895, the price of each being fixed. On September 17th, 1895, this contract was modified by reducing the number of houses to three, to be built that fall. This action was brought to recover for a breach of the contract, and it is held:

1. That the court was not in error in view of the testimony presented, in instructing the jury that the contract was separable, and that time was not of the essence of the contract.

2. Section 4 of the Mechanics' Lien Law requiring a building contractor to furnish the owner with a statement under oath of the names of the sub-contractors, etc., and providing that until the statement is made, the contractor shall have no right of action or lien againt the owner, applies to actions upon the contract, when the plaintiff has not effected a lien, as well as to cases brought to enforce a lien.—*Barnard* v. *McLeod.* (July 16, 1897).

MASTER AND SERVANT—UNSAFE PLACE—ASSUMPTION OF RISK BY SERVANT.—Where a servant who has knowledge of the unsafe condition of the premises, both from his own observations and from the directions of the master, voluntarily remains in the master's employ, he must be regarded as assuming the risks he incurred and to be without remedy for damages for an injury received thereby.—*Soderstrom* v. *Holland-Emery Lumber Company.* (July 22, 1897).

TAXATION—UNJUST ASSESSMENT—PAYMENT UNDER PROTEST—APPEAL FROM BOARD OF REVIEW.—Plaintiff having been assessed on it capital stock, applied to the assessors, sitting as a board of review, to deduct the value of the mortgages held by it from its capital stock. This the assessors refused to do. No appeal was taken to the common council, before the confirmation of the assessment roll, from the action of the board of review. The tax was paid under protest and this action was brought to recover the same.

Held: That having failed to appeal from the action of the assessors, to the common council, as provided in the city charter, plaintiff was not entitled to recover the tax paid under protest.—*Detroit River Saving Bank* v. *City of Detroit.* (July 22, 1897).

PROMISSORY NOTE—INADMISSIBILITY OF PAROL EVIDENCE TO VARY TERMS OF PROMISSORY NOTE ABSOLUTE UPON ITS FACE—In an action upon a promissory note given in purchase of certain cattle, the defendant offered testimony to show that the sum was not payable absolutely, but that in a certain event a less sum was to be accepted in discharge of the note, and, it is held, that the admission of this testimony was error.

Where a note is absolute upon its face no evidence of a verbal agreement made at the same time qualifying its terms can be admitted. *Phelps* v. *Abbott.* (July 22, 1897).

DEFECTIVE WALK—DECLARATION—ELECTION OF PLAINTIFF—JURORS—DAMAGES.—In a civil case one N. J. Gran was upon the jury list, and was called in making up the jury, being duly answered to. After the trial it was discovered that he was not summoned to attend as a juror, but that one Gustav Gran was, that he answered to the call, and sat upon the jury. Held: Not ground for reversal.

In an action for injuries received by reason of a defective walk, the testimony was in conflict as to which of two holes in the walk plaintiff fell into, and it is held, that inasmuch as plaintiff's declaration was broad enough to cover either, it was not error for the court to refuse to require plaintiff to elect, which of the two holes in the walk she would rely upon as having caused the injury.

In an action to recover for personal injuries where the declaration alleged only a temporary injury, it was not proper to allow a recovery for an aggravation of a latent disease which was not pleaded.—*Hall* v. *City of Cadillac.* (July 22, 1897).

## *CURRENT LITERATURE.*

*The Living Age* in a late number contains the first part of an interesting article on "Royalties" by Max Mueller, the fourth part of "The Amulet" and a very fine essay on "The Growth of Caste in the United States." The first part of "Thakur Pertab Singh: A Tale of an Indian Famine," which originally appeared in Blackwood's Magazine as well as several other articles, sketches and stories and selections from American Magazines completes one of the numbers of this weekly magazine. When one wishes reading matter to come in steadily and always with a welcome because it is so well selected that it cannot help but please, one of these magazines, which comes every week, is what is most satisfactory. Little's *Living Age* is one of the best.

*Popular Science*, a monthly magazine devoted to matters of general scientific interest, comes to our view every month and is always welcome. The articles promised for September are "How to Study Fungi," "The Opium Poppy," "Zinc Minerals" and many others. The August number was very interesting. Published by Lillard & Co., New York.

*Public Opinion* as a history of current events and as a record of all the topics which attract most attention, because they are so widely discussed by the newspapers, is a success. Here can be found a synopsis of the most thoughtful articles appearing in other magazines and periodicals as well as a very carefully selected collection of the newspaper editorials on the subjects of general interest. In one of the August numbers can be found a brief statement of the proceedings of the Virginia Democratic State Convention and the editorial comment made on its proceedings by the Richmond Times; the result of the election held August 10th in Indiana and editorial comment on it from three newspapers; minutes of the proceedings of the Ohio Populist State Convention and the Kentucky Republican State Convention. All these are in only one department "State Politics" and make up only two of the thirty-two pages of the magazine. Other departments are "Foreign Affairs," "Scientific," "Religious," "Letters and Art," and "Business and Finance."

*The Atlantic Monthly* for August contains among other interesting articles one which offers a very strong plea for the preservation of our forests. It contains an account of the wanton war of extermination ged waagainst some of the most glorious specimens of our forest trees and if anything would urge against this continued destruction this article ought to do it. We only talk though and don't legislate. This matter ought to be taken up in a serious determined way by those who are anxious to see our country wise in legislation and conducted with a policy which shall make us as we ought to be for years to come, a country rich in its forests and prospering partly through the wealth produced through its forests and their products.

# MICHIGAN LAW JOURNAL.

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## *CRIMINAL LAW IN ENGLAND.*

CLARK BELL.

The proposed amendment of the Law of Criminal procedure in England, allowing an appeal to the convicted, is attracting the attention, not only of the British public, but of all English speaking people.

A bill has been introduced in Parliament of Great Britain, by Mr. Pickersgill and his colleagues, which has already reached a second reading, entitled, a bill for the creation of a Court of Criminal Appeal, which has given rise to a discussion of the subject in England, the echoes of which have reached the ears of those who have a regard for the welfare of England in the Western Hemisphere.

The bill has a memorandum enclosed stating that "It is framed to give effect to the recommendations of the judges, in their report in 1892 to the Lord Chancellor. So far as is consistent with that purpose the drafting follows the bill brought in by Sir Henry James, (now Lord James of Herford) in 1890."

It is perhaps unfortunate that Mr. Pickersgill has placed the reasons of the bill on such narrow lines as the acknowledged disparity of sentences. He has been quoted as saying: "The bill was rendered necessary by the disparity of the sentences which were passed for precisely the same class of offenses and committed under similar circumstances."

Disparity of sentences is a recognized evil on both sides of the

Atlantic; one most difficult to remedy, but it is only an incident to the major and more important question which confronts the British publicists, where under the present system an innocent person wrongfully convicted on a trial before a single judge, is placed wholly outside the judicial power to correct any errors or mistakes of law or fact occurring on the trial, or review or modify the sentence.

It must be felt, however, that there is a radical defect in the existing system and that it should be within the power of the judges of England to remedy by review any conviction which has resulted from either.

*a.* The introduction of improper evidence.

*b.* Improper exclusion of evidence.

*c.* And to grant a new trial where the discovery of new evidence would tend to show an unjust conviction.

This review should be made by an appellate tribunal composed of several judges, entirely removed from the excitement and prejudices so often surrounding the trial in all cases where it appears to the court that the prisoner should not have been convicted, or that injustice had been done.

It is not compatible with the rights and safety of the citizen; with the dignity of the judiciary; nor with the majesty of the law itself; that the supreme judicial authority of the nation should be placed in a position where it cannot correct an acknowledged error of law by a single judge, in the heat or excitement of a trial, or a gross error of fact found by a jury; in cases where great public excitement, and even a hostile expression of public feeling, has surrounded both judge and jury, in criminal cases, especially in capital cases, where human life is at stake.

While the conviction of innocent persons on criminal charges may be conceded to be exceedingly rare, there is no one who will dispute or deny, that such cases do sometimes occur. It surely is unnecessary to cite examples here. But we must not fall into the error of regarding them so rare as not to require suitable recognition.

Mr. Justice Grantham states, as a fact, that 4600 petitions were made last year to the Home Secretary from convictions, upon which 420 orders had been made by that officer, granting relief asked, in whole or in part in England. What stronger fact could be found for the absolute necessity and propriety of appeal in criminal cases?

Why should English law deprive English judges of the power of remedying such miscarriages of justice?

It is not necessary to speak of the defects of the present system, which must rely wholly on a Home Secretary; who may not be a lawyer at all, or familiar with the principles of law. No Englishman can deny that an English full bench of judges, would be a safer and far better tribunal to pass upon such a case; than the present Home Secretary of Great Britain; and this must not be regarded as at all disparaging to the present official; and I would be willing to say, safer than any Home Secretary of Great Britain; in office for the past quarter century, and this I say notwithstanding some of the ablest men in England have graced that office in the recent past. An English judge should have the courage of his convictions, and be beyond the reach of popular clamor, and wholly outside of party behest or dictation. An English Home Secretary is a partizan political officer, and must take care that no act of his shall injure his party, and that his reason for action will satisfy his political friends.

The tribunal proposed by the bill, six judges selected by the judges of the Queen's Bench division of the High Court of Justice, sitting with the Lord Chief Justice, should surely command the confidence of the British public, and ensure against miscarriage of justice or injustice to the citizen.

It is doubtful if any judge sitting on the British bench would claim that his decisions in a civil case ought not to be subject to review by an Appellate Court. Why?

Is there any greater danger in the ruling of a single judge in the one case than in the other? Has the hurry and excitement of a trial, any conditions which make a trial judge infallible in criminal, and occasionally erring in civil trials? Is the liberty or the life of the citizen charged with crime, of less value in British eyes, than the bank account of the defendant; which should give a right to an appeal to save his property, and deny it to save his life?

The venerable Judge A. L. Palmer, who so many years has adorned the Supreme Bench of the Province of New Brunswick, in the Dominion of Canada, in explaining to me the workings of the Appellate Court there, from the decision of a single judge; where all the judges sit in review of the decisions of one; (who in that province sits also in review of his own decision and discusses with his confreres the reasons that influenced his ruling in the court below; that he has, where his own rulings have been under consideration, when persuaded by the reasoning of his associates, voted to reverse his own decision, and that similar instances are not unfrequent.

How much more dignified, how much more honorable to the judiciary of the British Province is such a method of rectifying a judicial error, occurring on a trial before a single judge, than to place it outside of the power of the judiciary, to correct its own errors, rectify its own mistakes within the lines of well defined judicial procedure.

Canada has always had its Minister of Justice, clothed with as great, and now with greater powers than the Home Secretary of Great Britain, in such cases, and yet it is the judges of the Dominion, that now correct by review on appeal in criminal cases, all errors of law or of fact.

It has been urged by Lord Justice Lopes in a charge he is reported to have made to the grand jury at the Wilts Quarter Sessions, in commenting on the "Bill for the creation of a court of criminal appeal" now pending in the House of Commons:

That the bill was very crude and difficult to understand; that it had a two-fold object: 1st. To give an appeal on facts in criminal cases, and thus minimize the risk of the innocent being convicted; and 2d. To promote the uniformity of sentences. And his lordship discusses the difference between the trial of civil and criminal cases thus:

The comparison of criminal cases with civil is delusive; they stand altogether on a different footing.

In civil cases the verdict proceeds on the weight of the evidence, and no verdict of a jury is allowed to be impeached, unless it is so unreasonable as to be almost perverse, a state of things which, in a criminal case, would justify the interference of the Home Secretary. In criminal cases the accused is presumed to be innocent until proven guilty, and the jury are emphatically told that they must not convict, unless they are satisfied, beyond a reasonable doubt, of the guilt of the accused.

The risk of an innocent person being convicted in England is infinitesimal, and that risk, in my opinion, will be practically removed if, as I hope soon will be the case, the accused and the husband and wife of the accused are permitted to give evidence in criminal cases.

This learned judge also adds:

The existence of a Court of Appeal empowered to reverse a conviction of facts will introduce an element of uncertainty in the administration of the criminal law highly detrimental to the deterrent effects of punishment.

And he adds:

It will relax, too, the sense of stern responsibility now so keenly recognized by the juries, proceeding, in my judgment, from the feeling that their verdict is final and irreversible.

And he also states as an objection:

Is there to be an appeal in every criminal case? If so, the temptation to appeal will be overwhelming—and at whose cost?

In the case of the poor man, it must be at the cost of the public, otherwise the rich will have an unfair advantage over the poor.

This learned judge may be said to voice the present objections to reform in British Criminal Procedure, on the part of some members of the British bench, or of those who oppose.

The light which experience has thrown on this subject, upon the objection presented by his lordship, in the American States and British Provinces of North America, has been brilliant, convincing, steadfast and so conclusive; that it is doubtful if any Canadian or American judge would share the apprehension Judge Lopes has expressed.

1. There is no American State, or British Province in the Dominion of Canada, that would consent to deny the right of appeal in a criminal case, where there was any reason to believe that such a review, might result in the reversal of an illegal conviction for errors of law, or errors of fact.

2. While it is quite true that the jury on the American continent would be instructed, as in England, "that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused," there is no difference here on the review, of the rules or weight of evidence on appeal, between civil and criminal cases.

Here we give the judiciary the power to correct its own errors and mistakes, if any have occurred; there the Judiciary are deprived of that right.

Would a British Bench of Review be an unsafe tribunal for such cases in the opinion of his lordship? Would the tribunal named in the bill be unsafe?

The presumption of guilt and innocence are alike in both countries, and its consideration is of course outside the question, of the necessity and reliability of the Court of Review in criminal cases.

I assume that Lord Lopes will agree, that the risk of the conviction of innocent persons is substantially alike, in England, the Canadian, the New England and indeed generally in the American States.

I quite agree with his lordship in fearing that the great evil of disparity of sentences can not be remedied, by such a clause, as is contained in the bill. No such attempt has been made here, that I am aware of in any American State.

In many of the United States, the husband and wife of the accused, and the accused, may testify, but no judge here, where such legislation as Lord Lopes desires generally exists, (and while many concur and agree with him in the wisdom of the provision), would claim under the light of experience, that this provision would result or has resulted in "practically removing the risk of the conviction of innocent persons."

Nor has the experience of all these years of our courts, nor the experience of our bench, of our bar, or prosecuting officers, given us any reason to claim that the right of appeal now universal in criminal cases, outside of Great Britain, has been detrimental to the deterrent effects of punishment as feared by his lordship.

A review of only one hundred years in the Law of Crime and Criminal Procedure in England, has led the thoughtful student of penology, to carefully review the whole subject of the deterrent effects of punishment for crime.

More than one hundred and fifty crimes were capital in England not many years ago. They are now reduced to three and practically to two, as no one has suffered death for treason in our day.

Has crime increased in England by reason of the abolition of these so-called capital offences ?

Has crime increased in any state or county where the death penalty has been abolished ?

We may be called upon, to recast our opinions upon the whole question of the deterrent effects of punishment upon the volume of crime, by penal statutes.

Facts, experience and results, are to our civilization not unlike the Rœntgen Ray to science, which penetrates those substances we were taught to regard as opaque by our early school masters.

In Her Majesty's Dominion of Canada, the law of criminal appeal is as broad and free, as in any American State.

Is the responsibility resting upon a Canadian jury less stern, less keenly recognized, less conscientious, less careful, intelligent and searching on a trial for murder, where the life or death of the accused is trembling in the balance, than that of a jury in London, in Liverpool, in Manchester, or anywhere in England, Ireland, Scotland or Wales ?

Each takes the same oath, almost identical as to form and substance.

How can the right of appeal everywhere, almost the inherent right of an American citizen, and of a Canadian subject of Her Majesty, lift in any sense the responsibility, that rests upon the conscience of a juror, either in one of the American states, the Canadian provinces, or in any one of the British Islands?

Lord Lopes thinks "that with a universal right of appeal the temptation to appeal would be overwhelming."

Let me assure his lordship, that so far as I know, in every American state, certainly in every British province in North America, the right of appeal, where the life of the citizen is at stake, in a proper case, is given to every human being.

As a result the facts do not bear out or justify the fears of his lordship. The courts hear them all without any strain.

"At whose cost?" asks his lordship, fearing the rich will have an unfair advantage over the poor.

Not so here, Lord Lopes—not so in the Dominion of Canada.

The Government, before it takes the life of the condemned, in all American courts, would, in case he appealed under the forms of law, see to it that his case was properly and ably presented to the Court of Appeal, and at the expense of the state, if the accused was poor and without means.

The consideration of the cost of an appeal, to the state is too low a plane, for the discussion of so grave a question, as the life of a citizen, charged with a capital crime, everywhere on the American continent, as it would be, in my opinion, everywhere in the Islands of Great Britain.

## The Home Office System.

It is not necessary to assail a system so long and so historically associated with the disposition of criminals as that of the English Home Secretary.

In many respects it is an admirable system. It should remain with all its functions and its powers unimpaired.

It has faults that could be corrected, evils that could be remedied, and its powers might be even increased, as has been done in Canada. At present its powers are limited to pardon and commutation.

Under American Constitutions, this is regarded as the province of the executive and is vested for the general government in the

President of the United States, for crimes against the government; and in the states,—in the executive sometimes acting with a board of pardons.

In the Dominion of Canada the power exercised by the Home Secretary in Great Britain, is vested in the "Minister of Justice," and the new statutes of the Dominion also give to this officer a power not given to the Home Secretary of Great Britain,—a power that is not executive, but judicial; a power unprecedented in modern governments, so far as I have any knowledge; a power in any case of his own volition, and in his discretion, *to order a new trial before any court in any part of the Dominion of Canada.*

Such a power could not be granted an executive, in the American States, because all judicial power and functions, are vested in the judiciary, by the organic law.

The right of appeal, if given in England, should not and would in no wise impair the power of function of the Home Office.

In Canada the right of appeal is entirely judicial, and is outside the functions of the Minister of Justice.

It is only recently that, in the government of the United States, a Court of Criminal Appeal has been created, in the Federal Courts.

Our early practice in this regard was based on English precedent, but the right of appeal in criminal cases was found to be necessary and proper, and the appellate tribunal was recently created.—*Medico Legal Journal.*

## THE LAW'S DELAY.

### *A Criticism of American Criminal Trials.*

When an institution fails to accomplish the purpose for which it was instituted, the necessity for reform may be considered to be established. Such an indictment may justly be brought against the system of criminal procedure in this country. As a punishment for wrong-doing, it is, at the best, uncertain; as a preventative of crime, it is wholly without effect. Ten years ago the arrests in San Francisco numbered 19,466, or about 77 to each thousand inhabitants; last year they numbered 30,462, or about 87 to each thousand. The cause for this is not difficult to discover. It is not because this is a new and lawless community—San Francisco may be considered to have sowed its wild oats many years ago; it is not because this is an immortal community. It is on account of the extreme leniency displayed toward criminals by the laws and in their application. The criminal is favored both by the delays in punishment and by the fact that he is allowed to take advantage of every technicality, while no technicality may be counted against him. This state is now witnessing two examples of the perfection to which the system of delays has been brought in criminal practice. Worden derailed a train of cars and murdered the engineer and several soldiers three years ago; the revolting crimes of Theodore Durrant were committed two years and four months ago. Yet both of these criminals are enjoying life and health, and their attorneys assert that they will continue to do so for a number of years. When William Fredericks entered a bank on one of the principal streets of this city and cooly shot to death the young cashier for the few dollars lying on the counter, it required one year and four months for tardy justice to overtake him, and our supreme justices were shocked at the "unseemly haste" of the proceedings.

What a contrast to this is presented by the case of Butler, the murderer of the Blue Mountains, who was arraigned and held for

trial within two hours after his return to Australia, and it was announced that he would be tried, convicted, and sentenced within six weeks. This program was carried out. Mrs. Carew, who poisoned her husband, was tried in Japan before an English tribunal and under English forms. Her husband died October 22, 1896, and on February 1, three months and nine days later, she was convicted, and is now undergoing her sentence of life imprisonment. Last year the people of the civilized world were horrified at the hearing of crimes of Mrs. Annie Dyer, the London baby-farmer, who made a business of killing infants. A babe was found in the Thames on March 30. Four days later she was arrested and arraigned on April 18. On May 22 she was condemned to be hanged on June 9, two months and ten days after the discovery of the crime. The point of view of the criminal law in England and in the British colonies is, in fact, very different from that which seems to be taken in this country. There the criminal is regarded as one who has violated tacit agreement with society, which all who enjoy its benefits must enter into, and it is held to be the duty of society in its corporate capacity to administer adequate punishment. In order that this punishment should be adequate it must be both swift and certain. If it fail in this, the relation between the offense and punishment becomes obscured in the mind of the criminal, and the restraining influence upon others is lost. In this country, on the other hand, the criminal procedure seems based upon the theory that the culprit is a ward of the state. He is given the advantage of every technicality, while technicalities cannot count against him. He is enabled to delay his punishment until its effects are lost and its infliction becomes uncertain. Society assumes the attitude of arming its enemy.

The lowest of the criminal courts in England is that of the justice of the peace, sitting singly or in petty sessions of two or more. They summarily determine certain specified offenses, corresponding generally with those classed as misdemeanors. They also sit as committing magistrates holding those charged with felonies for trial at the quarter sessions or at the assizes. The quarter sessions tries minor felonies, the more serious cases being reserved for the assizes. These latter sit in each county twice a year. When an accused person has been held by the committing magistrate, the trial at quarter session or at the assizes begins by the presentation of an indictment to the grand jury, numbering from twelve to twenty-three members, who are selected for the occasion. The judge delivers a

charge to the grand jury directing their attention to any peculiarities in the case, and they discuss each charge separately. They examine the witnesses in private, and, if satisfied that a *prima-facie* case has been made out, return a true bill. Upon this the trial proceeds before a judge and jury, the procedure being similar to that in this country. From the verdict of the jury and the sentence of the judge there is no appeal, thus placing the people and the prisoner upon an equality as regards purely technical questions. Any substantial defect or irregularity that materially affects the rights of the prisoner may be taken before the queen's bench on writ of error, but this procedure is not of frequent occurrence. If any difficult question of law arises on the trial the judge may reserve it for decision by the court for crown cases reviewed, by whom the case is either quashed or reversed, no new trial being had.

This procedure has grown up from the earliest days, with successive additions to meet new conditions. There is no general statute covering the whole subject. Yet it presents a cohesive and well-rounded system that is far more efficient for its purpose than that which prevails in this country. The methods by which criminals delay and defeat justice here, with the assistance of their attorneys, are illustrated every day. The delays by postponements of arraignment and trial, the appeals from judgment and orders affecting the rights of the prisoner, the applications to federal courts and the appeals to the federal supreme court—these all operate to give to the prisoner an undue advantage, since the longer the proceedings are continued the greater the likelihood that a mistake will be made by the representatives of the people that will result in giving the criminal his liberty. It is time that criminal procedure in this country should be changed, in order that the law may protect the industrious and law-abiding rather than the dissolute and criminal.—*San Francisco Argonout.*

## SOME OLD LAW-BOOKS.

Law-books are certainly among the things that have kept pace with the population. It is especially true of legal treatises that of the making of them there is no end; and there is scarcely a lawyer who would not add that much study of them is a weariness of the flesh. Although law-books were amongst the earliest works that issued from the printing press in England—the statutes of Henry VII. were printed by Caxton himself—yet Coke, writing some 250 years ago, could not count more than fifteen treatises on the law. Now the libraries in the Inns are scarcely less spacious than the dining halls, and the text books, to say nothing of the reports and statutes, are to be numbered by their thousands. Copies of all the ancient works mentioned by Sir Edward Coke may be found in the libraries of the Inns, and, though most formidable in appearance, some of them possess an interest for the general reader as well as the legal student. To Ranulph de Granville, who was Chief Justice in the reign of Henry II., belongs the distinction of writing the first treatise on the law. He combined with the learning of the lawyer the valor of the soldier, and he is known to fame not only as the father of legal literature in England, but as the captor of the King of Scots at the battle of Alnwick. Among the most precious volumes in Lincoln's-inn Library is a MS. copy of his treatise more than 500 years old. A peculiarity of Britton's work, which is believed to have been written under the direction of Edward I., is that the words are put into the mouth of the King. This treatise was written in French, in which language law books continued to be written for nearly four centuries. During the same reign the commentary on English law called "Fleta" was written. Nothing is known of the author except that he commenced and completed the work while he was confined in the Fleet Prison, a fact which explains its curious title. Littleton, who bears among Cook's fifteen authors the most familiar name, was a Judge of Common Pleas in the time of Edward IV. His cele-

brated work, the first edition of which was printed in 1481, is devoted to an explanation of the law as to the tenure of land. Its fame, has, of course, been largely preserved by the remarkable commentary of Coke, which, according to the enthusiastic and eloquent Fuller, will be admired "by judicious posterity, while Fame has a trumpet left her and any breath to blow therein."

A modern legal writer who arranged his work in the form of a dialogue would be regarded as frivolous. Yet this was the form in which two of the old jurists cast their work. Fortescue, who wrote his treatise in the reign of Henry VI., while in exile in France with the Prince of Wales and other members of the Lancastrian party, representing himself as conversing with the young Prince on the laws of England, and proving their superiority to those of other lands. "Doctor and Student," which was written early in the 16th century by Christopher Saint Germain, of the Inner Temple, is a series of dialogues between "A Doctor of Divinity and a Student in the laws of England, concerning the Grounds of those Laws." Perhaps the most interesting fact about this quaint production is that it was cited as an authority by the judges at the trial of Hampden. On a fly-leaf of the Lincoln's-inn copy of Fitzherbert's "Grand Abridgment of the Law" is the following curious inscription: "Of your charity pray for the soul of Robert Crawley, sometimes doner of this book, which is now worm's meat, as another day shall you be that now are full lustye, that remember, good Christian brother. Farewell in the Lord. 1534." The first edition was printed in 1516, and this is the date in the copy in Lincoln's-inn Library, which is singularly rich in ancient volumes. It would appear that the producers of law-books in Fitzherbert's days were gifted with a greater love for art than is possessed by the authors of modern law-books. Some of their title-pages were adorned by the most elaborate designs. The first part of "Fitzherbert" contains a woodcut of the King on his throne, whilst the second is ornamented by a wonderful collection of the royal arms, a dragon and a greyhound, two angels, some scrolls, and a rose. It would be difficult for an illustrated law-book to command the serious attention of lawyers in these days, even though its artistic embellishments came from Sir Frank Lockwood.

After speaking of such writers as Bracton and Littleton, one hesitates to describe Blackstone's Commentaries as an old law-book. It was first published at Oxford 137 years ago. But legislation moves so fast that to glance at an early edition of the famous work is to believe that it is older than it actually is. No law-book has

ever enjoyed so great a measure of popularity. As many as twenty-one editions were published before any alteration was made in Blackstone's text, and innumerable attempts have since been made to adapt it to the ever-changing law. How far these endeavors have been successful may be judged from the fact that the value of the Commentaries is now solely historical. As was once said, "The cannonade which has been playing on the Commentaries, exposing as they do, so wide a front, has rendered them, as they were left by their author a mere wreck." Not a little of their popularity was due to the impressive style in which they were written. Never in a law-book has lucidity been wedded so happily to felisity. It is clear, notwithstanding the complaints he addressed to his fellow-tenant in Brick Court, that Blackstone's literary powers were unaffected by the boisterous sounds in Goldsmith's rooms overhead. The basis of the Commentaries was a series of lectures which Blackstone delivered at Oxford, and this may partly account for their sonerous note. Like most of the eminent legal writers of the old school, Sir William Blackstone was a judge. Here, again, a change may be observed. The Bench is no longer recruited from the ranks of text-writers. Judges whose stepping-stones to fame were books are still to be found in the courts. Lord Justice Lindley, for instance, owes his judicial seat largely to his standard work on partnerships. But there is now a strong tendency to exclude text book writers from the active practice of the law, to make them a separate class of superior persons whose refined minds ought not to be devoted to anything less noble than the theory of the law.

During the past thirty years the publication of leading cases has been under the control of a council representative of both branches of the profession. The Law Reports have not, however, caused such old established reports as the Law Journal Reports to disappear. The earliest reports in the libraries of the Inns were issued in the reign of Edward II. Until the time of Henry VIII. the business of reporting was in the hands of lawyers, who were paid by the Crown. Their reports, which were published annually, are known as "Year Books." These are among the most quaint and valuable volumes in the libraries. To modern eyes, it is true, neither their bulk nor price is imposing. At the end of the Tenth Book of Edward IV.'s reign, which consists of forty pages, are these words: "The price of thys boke is iiid. unbounde." The ordinary reader who looked for entertainment in these time-worn pages would suffer some disappointment, but it is said that Serjeant Maynard had "such a relish of the Year

Books that he carried one in his coach to divert his time in travel, and chose it before any comedy." After the crown ceased to supply the courts with reporters, the business of preserving the important decisions of judges was undertaken by a succession of eminent lawyers, among the number being Coke and Plowden. Law reporters grew so numerous after the Restoration that a diminution in their number was regarded as imperative, and an act was passed prohibiting the publication of law-books without the license of the judges. The rapid increase of reporters had, however, no peculiar relation to the restoration of the Stuarts, for Bulstrode, the foremost reporter during the Commonwealth, alluded to the multiplicity of reports in these picturesque terms: "Of late we have found so many wandering, masterless reports, like the soldiers of Cadmus, daily rising up and jostling each other, that our learned judges have been forced to provide against their multiplicity by disallowing of some posthumous reports, well considering that, as laws are the anchors of the republic, so the reports are as anchors of laws, and, therefore, ought to be well weighed before being put out."—*London Globe.*

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ROBERT T. SPEED, Editor.

## *NOTES.*

The subscribers of the MICHIGAN LAW JOURNAL will note with the current number an entire change in the management of the paper. Messrs. Palmer and Graham have transferred their interest and good will to Mr. Robert T. Speed. It will be the endeavor of the new management to maintain the former standard attained by the JOURNAL, and to this end will make but few changes. The page heretofore devoted to a review of current literature will be discontinued, and in its place we will print a digest of the important decisions from every section of this country, and Canada, thus giving the paper an additional value. The JOURNAL will hereafter be published on the first instead of the last of each month, as formerly. Any suggestion from our patrons regarding the management or conduct of the paper will be gladly received.

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Our leading article "Criminal Appeal in England" should prove of considerable interest to our readers. The fact must not be overlooked that some of our best lawyers and jurists advocate the abolition of appeal in criminal cases. It will be remembered that Mr. Justice Brewer of the United States Supreme Court read a paper before the American Bar Association at its meeting held in Detroit last year, in which he opposed the practice of allowing appeal in criminal cases. The reading of the paper brought about a heated discussion, in which several prominent lawyers took part, including Mr. James C. Carter of the New York bar who sided with Judge Brewer.

Much has been said of recent years upon this question, but we believe the prevailing sentiment in this country is in favor of allowing an appeal to those convicted of crime.

It will be noticed that our second article on "The Law's Delay" also has something to say about appeals in criminal cases. While it does not in direct terms condemn the practice yet it takes the position that the appellate courts by the application of technical rules of law often delay or entirely cut off the punishment of criminals. The article gives some interesting facts regarding the prompt administration of the criminal laws in other countries.

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A few weeks ago, through the columns of the daily press, came news of the distressing illness of Judge Thomas M. Cooley, and his withdrawal from the active duties of life. Since that time in many ways has been manifested the sadness with which the announcement was received by the members of the legal profession throughout the entire country. The ending of the honored career of the great judge and commentator has brought sorrow to thousands that knew him as a judge, a teacher, a lawyer, or a friend. Seventy-three years have passed since Thomas M. Cooley was ushered into the world, during which time, by tireless industry and intense application, he won a fame that will live as long as the constitution.

During his connection with the law school of the University of Michigan he became endeared to the many graduates of that institution. President Angell says of him: "The fame which during the years of his connection with the law school he was winning as a judge, and as an author of law treatise, was constantly bringing great honor to the school, and inspiring his students with the deepest respect for him and with pride in his achievements. As dean and the only resident professor, he was brought into close personal contact with the students. He was ever accessible to them, his relations to them were most informal and friendly, they consulted him with the utmost freedom, and they always left the school with a mingled feeling toward him of gratitude and reverence. His untiring industry furnished a most stimulating example to them. His simple, but pure and noble, character left its impress on every student who was capable of being inspired by purity and nobility. The elevating influence which he exerted upon the personal and professional life of thousands of students who were under his care can not be measured."

Judge Cooley was a frequent contributor to the leading reviews and often delivered addresses upon important public occasions. In an article published in the Southern Law Review in 1877 on "Liability of public officers to private actions for neglect of duty," he opens with the sentence: "A public office is a public trust." The first utterance of this now famous sentence has been credited to several prominent men but there is no reason to doubt that Judge Coo-

ley was its author. Some of his text books have been called classics of legal literature. His Constitutional Limitations, which first appeared in 1868, is probably his best work. There is an unpublished story that this book, which gained its author the reputation of being the highest authorities on constitutional law, went begging for a publisher until a famous legal writer of the day became its sponsor. His work on the interstate commerce commission brought forth his best powers. One of his colleagues on the commission has said that Judge Cooley did for the body of inter-state commerce law what Marshall did for the constitution, in determining its scope and meaning. In the arduous duties of his position he overtasked his constitution, and his late years have been spent in the quiet of his home. He has won for himself a place among the great of his generation, and his life will be an inspiration to the thousands that come after him.—*Chicago Legal Adviser.*

## LEGAL MISCELLANY.

The next term of the Supreme Court of the United States Supreme Court begins on the 11th of October. There are 446 cases on the docket showing an increase of 63 cases since the adjournment of the court in May.

Of these cases 128 are from the state courts, 110 from the new federal courts of appeal, 49 from the United States circuit courts, 46 from the territorial courts, 32 from the courts of the district of Columbia, 29 from the court of claims, 26 from the private land court, and 17 from the United States district courts.

"This government by injunction is the most absolute despotism and the most flagrant usurpation known to organized society. The power of the federal judges, as construed by themselves, is greater than the constitution or the fundamental rights of man. It suspends the freedom of speech and of the press. It destroys individual liberty. It exceeds in pretensions and in performance the exploded doctrine of the divine right of kings. No greater menace to our liberties could be devised than the federal judges' arbitrary assumption of omnipotence and infallibility."—*Ohio Legal News.*

It is said that Barnum once summoned a lawyer and laid before him a case which he claimed was troubling him.

"A neighbor of mine keeps peacocks. Suppose one of them should fly over into my yard—which they are doing all the time—and lay some eggs there. Would those eggs belong to me, or could my neighbor compel me to give them up?"

The lawyer, having duly scratched his head, replied that really he should have to look the matter up. "But," he continued, "meantime it would be best for you to keep the eggs, and let your neighbor sue for the possession; in that way your rights would be determined and we should have a valuable test case."

"Well," said Barnum, "while you are looking into the matter, will you also find out how it would be if the eggs were laid by peahens?" The matter was never looked up.—*Chicago Post.*

Mr. Justice Hagner, a distinguished American judge, in addressing the graduating class of the Columbian Law School, spoke as follows of the duties of an advocate: 'As there can be no vicarious atonement for personal errors, you must accept as an impregnable truth that there can be recognition of a profession, as separate from a personal test of honor. And yet we frequently hear cited, as with approbation, the celebrated—I might well say the *abominable*—sentiment of Mr. Bougham, uttered in the trial of Queen Caroline, which, as commonly interpreted, if acknowledged as the correct ethics of the profession, would go far to justify the extremest aspersions heaped upon the law as an unworthy calling, sustained by chicanery, and only intended "to make the worse appear the better reason." Unfortunately the words are too familiar: "An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world—*that client, and none other.* To save that client by all expedient means, to protect that client by all hazards and costs to all others—and among others himself—is the highest and most unquestioned of his duties, and he must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client's protection." Lord Brougham afterwards explained, as in justification, the monstrous circumstances under which these words were spoken. Viewed from their standpoint, the Queen's counsel were opposing a debauchee, called, with an undersigned but perfect irony, "the finest gentleman in Europe," who had resolved to rid himself of a queen personally offensive to him, and was employing all the power of the Crown to accomplish her destruction. A host of foreign witnesses, her discharged servants, were exaggerating her every indiscretion and aspersing the motive of her every unguarded act. It was clear to her defenders that her doom was sealed, unless they could compel the abandonment of the prosecution. In this grave emergency it was resolved to appraise the royal prosecutor publicly that others besides himself and his intimates were aware of his terrible indiscretion, by which, according to the Act of Settlement, he had forfeited the Crown of Protestant England; and the most audacious of the counsel was selected to give utterance to the warning. The scheme proved successful: the chief huntsman called off the harriers from the pursuit of the panting hare; and England was spared the risk of a grave political complication: for the case comprehended weighty consideration of governmental policy more important than the personal questions involved. But to apply these sentiments to the ordinary professional demeanour of lawyers would be as gross a perversion of propriety as it would be for soldiers to employ the strangling handkerchief of the thug or the tactics of the mosstrooper.'—*The Law Journal, London.*

# DIGEST OF RECENT DECISIONS.

ADULTERY.—A "maiden," named in an indictment for adultery, held to mean merely an unmarried woman, and not necessarily a virgin. *State* v. *Shedrick* (Vt.), 38 Atl., 75.

ASSIGNMENT OF CHOSE IN ACTION.—SUIT BY ASSIGNOR.—An assignor of a chose in action, secured by a vendor's lien cannot sue in equity to enforce the lien for the benefit of his assignee.—*Penn* v. *Hearon*, (Va.), 27 S. E. Rep. 599.

ASSUMPSIT, ACTION OF.—One to whom money is given to keep at interest, and pay the fund to another on reaching a certain age, held liable therefor on assumsit.—*Parker* v. *Parker*, (Vt.), 37 Atl., 1112; *Lynde* v. *Davenport*, 57 Vt., 597.

ATTACHMENT.—An attachment levy held not wholly invalid because the appraisement includes chattels in the safe, to which the sheriff has not the combination.—*Dodson* v. *Wightman*, (Kan. App.), 49 Pac., 790.

BUILDING AND LOAN ASSOCIATIONS.—SURRENDER OF STOCK.—Where a building and loan association's by-laws provide that a member who has made all payments may surrender his shares of stock at any time after a certain period from the date of his certificate, on giving 60 days' notice, and take the withdrawal value thereof in cash, the relation of debtor and creditor is established as soon as the member has surrendered his stock, and has given the required notice.—*McNab* v. *Southern Mut. Building & Loan Association*.—8 (Car.), 27 S. E. Rep., 543.

CARRIERS.—A street car conductor need not assist a vigorous young passenger to step down from the side board of the car. *Conway* v. *Lewiston & A. Horse R. Co.*, (Me.), 38 Atl., 110. Where the street car ran past the crossing, and on getting off, a passenger stepped on a stone, and was injured, held, that the company was not liable.—*Conway* v. *Lewiston & A. Horse R. Co.*, *supra*.

CONTRACTS IN RESTRAINT OF TRADE.—CONSIDERATION.—A completed sale of a business is not a sufficient consideration for a subsequent contract by the seller not to engage in the same business in the vicinity within a certain time.—*Cleaver* v. *Lenhart*, [Penn.], 37 Atl. Rep. 811.

FRAUDULENT CONVEYANCES.—The fact that a deed was delivered to a child by one sustaining the relation of parent to her, and that she had rendered services to the grantor, held not to show a valid consideration.—*Dodson* v. *Severs*, [N. J. Ch.], 38 Atl., 28.

GARNISHMENT—JUDGMENT AGAINST GARNISHEE.—A judgment against the garnishee, when there has been no judgment against the defendant in the suit to which the garnishment is ancillary, is void.—*Shoemaker* v. *Pace*, [Tex.], 41 S. W. Rep. 498.

GARNISHMENT—SET-OFF.—A garnishee may plead as a set-off a note against the defendant assigned to him prior to the institution of the action.—*Kelly* v. *Talbott*, [Ky.], 41 S. W. Rep., 439.

INJUNCTION—Where the lessee attempts to use the premises for a purpose other than that for which he leased them, the lessor is entitled to an injunction.—*Spalding Hotel Co.* v. *Emerson* (Minn.), 72 N. W., 119.

NEGLIGENCE—On question whether parents of a child by their negligence contributed to its death by a street car, the fact that the father was away from home and the mother had charge of a store, and while engaged the child escaped and went on the track, will be considered.—*Levin* v. *Metropolitan St. Ry. Co.* (Mo.) 41 S. W., 968.

PARENT AND CHILD.—Obligation of a father to support his child not discharged by divorce procured by the mother with custody of the child. Doloff v. Doloff (N. H.) 38 Atl., 19. A parent held liable for board and nursing of his unmarried daughter, though she was of age, and he had made no express promise.—*Parkhurst* v. *Krellinger* (Vt.), 38 Atl., 67.

PARTNERSHIP—WHAT CONSTITUTES—In order to establish a friend in business, several persons executed an agreement appointing him their agent to carry on a certain business, and providing that they should advance him money up to a certain sum, and should own the stock in trade; that such agent was to repay from time to time the money advanced, was to be paid solely from the profits, and be responsible for all losses. The principals in such business did not intend to thereby become partners: Held: that as between themselves they were not partners.—*Krall* v. *Forney* (Penn.), 87 Atl. Rep. 846.

RAPE—Evidence held to sustain a conviction, though the delay of prosecutrix in complaining was unexplained. *State* v. *Marcks* (Mo.) 41 S. W., 978; *Higgins* v. *People*, 58 N. Y., 377.

RECEIVERS—It is not an abuse of discretion to appoint a receiver for a corporation where violent internal dissentions exist, and two sets of officers are struggling for the right to administer the affairs of the Company.—*Schmidt* v. *Mitchell* [Ky], 41 S. W., 929.

SALES—Where the seller notifies the buyer that he will not deliver the property purchased, and the buyer purchases the same kind of property from another at its then market value, and at the time delivery was made to be the market value was below contract price, the buyer cannot recover such advanced price paid.—*York Draper Mercantile Co.* v. *Lusk* [Kan. App.], 49 Pac., 788.

STREET RAILROADS.—City cannot contract with Company, that, if proceedings by the city are not begun within six months after a forfeiture of franchises has accrued, the city shall be deemed to waive the effect of such forfeiture.—*State ex. rel. Kansas City* v. *East Fifth Ry. Co.* [Mo.], 41 S. W., 955.

TRIAL—The Court may direct the jury to return a verdict when a contrary verdict could not be sustained on the evidence introduced.—*Bennett* v. *Talbot* [Me.] 38 Atl., 112.

# MICHIGAN LAW JOURNAL.

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## *DIRECT LEGISLATION AND THE LAW.*

The editior has requested a presentation of Direct Legislation in the *Michigan Law Journal*.

In compliance with this request I have endeavored to confine myself to certain phases of Direct Legislation, leaving many applications of the method for the discussion elsewhere.

Direct legislation comprises the referendum, the initiative and the imperative mandate. The referendum is a demand by a stated percentage of the voters (usually 5) that a particular bill or law before a legislative body shall be taken out of the hands of the legislators, and settled by the people. The filing of a demand, signed by the requisite number of voters, with the clerk of the legislative district constitutes a veto upon the action of the legislature.

The measure thus vetoed is then submitted to popular vote, usually at the next regular election.

Inasmuch as, under our constitution, all power not delegated by the people rests in the people, it is evident that a law thus passed by the people is final.

There can be no veto or modification of such a law by either representatives, executive or court, for all of these, receiving their delegated powers from the people, are below the people, and cannot undo the act of the people.

The initiative is the necessary complement of the referendum. By it a similar percentage of the people frame a bill and secure its submission to vote of the people. If enacted it becomes law without any action of either legislature or executive.

The initiative is made necessary because, without it, a representative legislature could thwart the power of the people to use the referendum by smothering a desired bill in committee.

The imperative mandate is the application of direct legislation to the impeachment and removal of any officer. When a demand is properly signed by the requisite number of voters, calling for the summary removal of any agent of the people, an immediate referendum vote of the people follows and the offending officer can be promptly removed.

To sum up: Direct legislation is a modification of representative government by which the people do not delegate absolute power to either of the three co-ordinate branches of government but reserve to themselves the right to use the powers which are inherent in the people but which we now delegate entirely. It proposes that the people shall take back powers which experience has shown to have been unwisely given away. It does not propose to do away with representative government, but to assert the constant control of the people over their agents.

Now as to some of its applications: When a court declares any law to be unconstitutional, the effect is an instant repeal of the law. The will of the people, as expressed by their representatives, is made of no effect by the will of one or a few men. Such a reversal of the will of the people is impossible in England and is a very serious menace to free institutions here. It puts the final power in the hands, not of the people, but of men who are not responsible to the people. This in fact, if not in name, makes this a government by an autocracy. Sooner or later all of the dangers of autocratic government are likely to appear.

Direct legislation proposes this: Whenever any law is pronounced unconstitutional by that fact, without any further action, it becomes imperative to refer the law in question to vote of the people. The decision of the people settles at once and without further dispute the constitutionality of the law. If affirmed by the people it has behind it precisely the same sanctions which make any part of the constitution binding, to-wit: the approval of the legislature and also of the people. It is evident that such a procedure would have several wholesome results; first, the judges would be kept under a realizing sense of their responsibility, for the judge himself would be put on trial before the court of last resort, the people; second, a law receiving such endorsement would have binding force, for there could be no question of the power behind it. And, third,

this would compel much greater care in framing laws than is now used.

Direct legislation would lessen in a great degree the number of laws. At the last session of the State Legislature of Michigan nearly eleven hundred bills were introduced and some four hundred passed; of these only a few were of general application to the state, the rest were local measures. Under direct legislation local self-government would inevitably result. It is notorious that the mass of local bills are passed, not after due deliberation, but at the personal request and on the individual endorsement of members from each locality. It cannot be otherwise. Only the voters and tax-payers of a village know whether they need and wish to pay for a bridge over the adjacent creek. The legislators in general cannot know. All local measures ought to be, and under direct legislation would be settled by the citizens of the locality interested. This would leave to the state legislature the consideration of measures affecting the whole state. There would be ample time for real consideration, the knowledge that the people could at any time veto the action of the legislators would compel careful consideration. A few well devised laws would be passed and the legislators would retire to their homes. There would be a great saving in expense, and such laws as were passed would not be dead letters. As it is now there is a constant flood of laws which, having no public opinion behind them, are not enforced. This breeds a general contempt for law; not a safe or wholesome thing.

Direct legislation further offers an effective solution of the vexed question of government by injunction. Whatever may be the underlying philosophy of the injunction, this much is certain, that an injunction is practically a legislative act. It is a law passed, not by the legislature, but by a judge. Now all laws passed in the manner prescribed by the constitution, that is by legislators, have a known and definite penalty for their breaking and the purpose of the law is expressed in its title. A man can know the law, is expected to know it, and knows precisely the limit and kind of punishment he will incur by breaking it. The law termed an injunction is not so. It is passed by one man, the penalty is neither known nor limited and is at the will of the man who makes the law. This is a dangerous power and, rightly or wrongly, is arousing intense hostility. While it is at once granted that an injunction serves an excellent purpose in preventing certain grave injustices by its restraining power, while philosophically it may be right, the recent extension

of the power of injunction, or more properly speaking, the recent extension of the definition of "contempt of court," has practically led to a reversal of the constitution. It has destroyed the guarantee of the constitution of the right of the citizens to organize, petition and agitate for the redress of their grievances and to carry arms for their own protection — it has destroyed the right of trial by jury. Direct legislation by the use of the initiative offers a solution of this difficulty. Upon any judge issuing a permanent injunction, if the legal percent of voters frame a bill upon the matter concerned in the injuntion, this bill can be submitted to popular vote at a special election and the decision of the people would at once and definitely settle the question. Thus, the remedy for a possible injustice in an injunction is an appeal to the people as the court of last resort.

Direct legislation practically involves that all franchises and special privileges will be granted only by the people themselves. In this one fact will be found the solution of the question of political corruption. The purchase, by bribery, of public servants is almost always done by private individuals or corporations who desire the privilege of doing the public business. Eliminate this from the life of a representative and at once the dishonest man who seeks election for the very purpose of being purchased, will have no further interest in political life. At once the desire of the clergy, of the good government clubs, of the committee of public safety is realized. These good people have proclaimed that all that is necessary, is to put good men in office. A delightful truism. Unfortunately they have not to any great extent succeeded in getting good men into office, nor in keeping them good after they were in. Direct legislation, by making the bad men anxious to keep out of office, would fill the offices with good ones. By its constant control of its agents would keep them good or promptly get rid of them.

Direct legislation makes the safety of the people the highest law, makes the will of the people the supreme law, educates the people in the knowledge of the law and increases the respect for law. Direct legislation is not radical but conservative, for responsibility always creates conservatism, and under direct legislation the people will suffer if they act unwisely and will learn by suffering.

DAVID INGLIS,
President Direct Legislation League of Michigan.

# GEORGE VAN NESS LOTHROP.

BY HENRY M. CHEEVER OF THE DETROIT BAR.

On the 12th of July, 1897, George Van Ness Lothrop died at his home in this city, at the age of 80, after a brief illness of less than two weeks.

An eminent and honored member of the Detroit bar, a distinguished citizen; the profession which he honored, as well as the State in which he lived, sincerely mourn his loss.

Mr. Lothrop was born at Easton, Connecticut, Aug. 8th, 1817. He lived upon his father's farm until he was fourteen years of age when he received an academic education and entered Amherst College in the fall of 1833.

In 1835 he entered the Sophomer class of Brown University, and was graduated from this institution in 1838.

In the Harvard Law school he remained one year, pursuing his studies under the eminent Judge Story and Prof. Greenleaf. His health failing, he removed to Kalamazoo county in this State, and lived with his brother, Hon. E. H. Lothrop for three years upon the latter's farm in that county. Having recovered his health he came to Detroit in 1843, and entered the law office of the Hon. James F. Joy, where he resumed his law studies which had been interrupted by his ill health, and in 1844 he began the practice of law in connection with D. Bethume Duffield in this city. This co-partnership continued until 1856.

In 1848 Mr. Lothrop was appointed Attorney General of the State of Michigan, which office he held until 1851. He was elected City Recorder of Detroit about the year 1849, and a member of the State Constitutional Convention of 1867.

For four years after 1863, he was inspector of the Detroit House

of Correction, and from 1880 to 1886, he was one of the Commissioners of the Detroit Public Library.

Mr. Lothrop was a delegate to the Democratic National Convention at Charleston in 1860, where he warmly supported Douglas for President, and was a leader of the Michigan delegation in that convention. In 1885, he was appointed by President Cleveland envoy extraordinary and Minister plenipotentiary to Russia. He remained at his post until 1888, when he resigned this important position and returned to Detroit. During the war Mr. Lothrop was an ardent supporter of the government, and, but for the fact that he lived in a republican State, he would have assumed that high position and influence in National politics to which his gigantic intellect, his consumate knowledge of legal principles and his great gift of oratory entitled him.

Before his admission to the bar, and while pursuing his legal studies in the office of James F. Joy, special permission was granted him by the Supreme Court to argue the celebrated case of the Michigan State Bank against Hastings. His argument on this occasion was brilliant, able, and showed a knowledge of legal principles rarely to be found in one of his years.

Mr. Lothrop was recognized as a leader at the bar, which position he maintained by the universal consent of his brothers in the profession until he retired from active practice to assume his duties as Minister to Russia. He was well versed in every branch of his profession, a fine classical scholar, with a mind well balanced, and with an accurate judgmen t. His manifestation of his gifts, when occasion required, was always with great force and perfect good taste. He was a man of great personal dignity, but never severe or harsh in his intercourse with others.

The professional life of Mr. Lothrop makes complete, one of the most interesting and instructive chapters in the history of the bar of this State. It is a chapter which may be read with equal interest and profit by the non-professional as by the professional man.

As a counselor in the office he was wise and honest; as an advocate in the courts he was eloquent and sincere; in the preparation and trial of cases he was skillful and indefatigable.

He entered upon the practice of his profession with a high sense of the duties of a lawyer, and with a conscientious appreciation of the obligation he assumed; and during his long and eminent career he never lowered his professional standard for personal gain or popular applause, nor did he under any circumstances fail to

maintain that standard without abatement during his whole professional life.

Faithful in every place to which he was called; conscientious in his discharge of duties, he had finished his work before the sunset of his life came.

Mr. Lothrop was not a partisan, he was a citizen. His life study had taught him that the happiness of a nation depended chiefly upon the government under which they lived and his experience taught him the dangerous tendencies of democratic turbulence on the one hand and aristocratic tyranny on the other, and so he was above all a patriot.

He was averse to arbitrary power of the government, whatever form it might assume; but he was equally opposed to an unreasoning liberty of the governed, which tended to anarchy.

He believed and taught the doctrine that men would never willingly obey a law which was a dead letter to them, and that only when they were trained by education and discipline as to the duties of a citizen could the law command a willing obedience.

He was a firm believer in the doctrines of the Christian religion and acted upon these precepts in his daily life.

His religious belief failed to recognize any privilege in itself, but knew only that it was a life, to be lived, because it was right and as a humble recognition of divine favor.

In his professional life he was skilled in knowledge and inflexible in performance.

As a citizen he was honest and patriotic.

In his religious character he was consistent and sincere.

In his domestic life he was kind and affectionate, and beyond reproach.

But in this noble life, now ended, there was a maturity of soul and kindliness of feeling which was worth more than the brilliance and strength which preceded his closing hours.

"Calmly he looked at either life, and here—
Saw nothing to regret, or there—to fear."

# MICHIGAN LAW JOURNAL.

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Articles of interest to the profession, addresses, criticisms on law subjects, or discussions on questions of timely interest solicited from members of the bar.
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ROBERT T. SPEED, Editor.

## *EDITORIALS.*

We rarely find a physician who takes so much interest in public affairs, and who is so well versed on all sociological problems as Dr. David Inglis, the author of our leading article, "The Referendum and the Law." The doctor never permits outside matters to interfere with his professional duties; but when freed from those duties, and in the quiet of his home, problems which agitate and baffle the public mind, engage his attention.

One cannot talk with him without feeling that he has the welfare of the people at heart; and whatever may be thought of the reforms which he advocates, there is much consolation in knowing that he is honest in his opinions, and that they are formed after mature deliberation, and are not fanatical.

While he recognizes that the existing American institutions were born of the purest thought and conceived by the best intellects of the age, yet he knows that "all things wax old"; he believes that the pressure of too many years of political corruption has corrupted that which our forefathers had thought nigh incorruptable, the government they formed, and which they supposed to be one by and for the people.

The doctor does not believe that the referendum will be a panacea for all ills; but he does believe that it will remove many of the burdens under which the American people now labor. He also believes that these burdens are of too long standing, too extensive, and too

deeply rooted to be speedily lifted, and that any sudden change in existing methods would be attended with danger.

We do not care to criticise our own articles, but a few observations by us will not be out of place.

It will be remembered that according to the referendum scheme it is proposed that the government shall be of the representative kind. Now, it is certain that the referendum will make either tools or fools out of legislators. There is always a temptation presented to an assembly of popular representatives to avoid taking action in matters upon which it is known great difference of opinion exists, and in respect of which inflammatory feelings are aroused. It is easier to avoid making enemies or losing friends by simply throwing the matter back on the people themselves. This would be a gross dereliction of governmental duty on the part of the legislature.

Simply ignoring the duties of a legislature, by handing over difficult topics to the people, it is to be noted as one of the perils inherent in a democratic government.

Again: There is always uncertainty in a test for estimating public opinion. There is always an open field presented for the manufacture of factitious, and spurious counterfeits of a true and populous conviction. The majority of the population (as things are at present,—and for a long time to come no change can take place, if it ever does) have no political convictions at all. They are, therefore, easily open to moral pressure, and fanatical scientific wisdom.

Again: There are large classes of laws—those which touch upon the moral habits, and physical health of the people—which affect one class or order of persons in the community in a different way or to a different extent, from that in which they effect all the rest.

Thus for instance, in our own state, laws have been enacted, or have been called for, affecting solely the sellers of certain wares, or those belonging to certain trades or professions, or those earning their livelihood in certain definitely described ways. The persons who are specially or immediately interested in the enactment, the modification, or the repeal, of such laws, are at the first, only a small section of the population. But they thoroughly comprehend the subject, or, at least, one side of it—the one nearest to themselves. They are ready with all the arguments which tell in their favor, whether real or fallacious. Such persons are not likely to be distracted by considerations of ulterior policy or interest other than their own, or what they may have taken up as their own.

Again: One of the most misleading of indications is the fanatical cry for changes in the law. It is only as the people become better educated, and less servile to the laadings of the press, the platform, and the parade of scientific statistics, that they can be safely trusted in the process of enacting laws.

Again: Laws enacted solely by the people can have no better foundation than if enacted by a representative legislature. The

reason is obvious. The apparent success of a law may only mean that what in a healthier condition of society would work badly, and be resisted, does, in a depraved condition of society meet with general approval.

And again: Let it be remembered that the American form of government is the best under the sun, and that there is no real fault to be found in the present method of enacting laws.

I am not prepared to say that the imperative mandate, that is, the impeachment and removal of public officers directly by the people, would not be a good thing. But I have grave doubts whether such a scheme could be made practicable.

These considerations point to the fallaciousness of the notion of making experiments in legislation.

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We recently received the following letter from Mr. Mark M. Powers, of Grand Rapids. The letter speaks for itself, and anything from us, except in the way of indorsement, is unnecessary:

EDITOR MICHIGAN LAW JOURNAL:

Ever since I was admitted to practice law, and even before, I have had a strong desire to know something about the rudiments, at least, of the civil law. It appears to me that a person cannot be a well grounded, fully developed lawyer until he has obtained a knowledge of that law which is the foundation of the English, and our American jurisprudence, and to which the common law owes so much of its primal principles, (even more than many of our profession are aware.)

This present season I have an opportunity to read three works of Sir Henry S. Maine's, on the ancient and civil law, and an English translation of Justinian's institutes, edited by Hunter, (the last not being as satisfactory as could be desired, owing to its want of proper and concise arrangement, and its want of wise discrimination of how best to profit the reader.) My reading of these works has increased my desire to know more of the civil law. I have often thought it would be a good idea for the authorities of the Michigan University to make provision for a course of lectures in the law department to be delivered by a person well versed in that branch of jurisprudence, especially so as one of the states of the Union uses the civil law as the basis of its practice.

I write this communication merely as a suggestion. Would it not be well for the JOURNAL to use its efforts in working up a sentiment which will eventually lead to the introduction of such a course of lectures in the University? Would it not serve to keep the University in the van of public progress, and meet a want of the people, and this redound to the benefit of the State?

MARK M. POWERS.

GRAND RAPIDS, MICH.

Beginning with our November number we will publish an article on "The Law of Trade Marks," written especially for us by Mr. Chas. F. Burton, of Parker & Burton, the well-known patent attorneys of this city.

The article is to be continued from month to month, and will, when concluded, make a complete text book on this subject.

Merchants and manufacturers have of late years availed themselves of the protection afforded by trade marks to such an extent, that it is fast becoming one of the most important branches of the patent law, and for this reason the series should prove interesting and beneficial not only to the profession but also to our lay readers.

## *LEGAL MISCELLANY.*

Italy abolished capitol punishment in 1875, and since then the number of homicides has increased 42 per cent.

No divorces are granted in Mexico. The courts, for good and sufficient reasons, will grant a separation for forty years, but that is the most that can be done.

Police Magistrate W. R. Timmons, of Danville, Ind., who sentenced a woman to the rock pile for 30 days, on Aug. 20, imposed as a punishment on three boys an hour's reading of the bible each day at the police court.

Edward Everett Hale tells of James Russell Lowell's first client when he started in law. After Lowell had nervously given the client a chair, taken his hat, and sat down with his note book to take notes on the case, he found that his visitor was a painter come to collect a bill.

A Frenchman was convicted of killing his mother-in-law. When asked if he had anything to say for himself before taking sentence he said: "Nothing, excepting I lived with her twenty-one years and never did it before."—*Chicago Law Journal.*

Counselor Quibble: "Law, my boy? Why, this whole universe is an example of the reign of law."

Young Gibby: "Maybe; but there is no fool legislatures assembled every now and then in the realm of nature!"

According to an old law in St. Louis, a man may be sold at auction to the highest bidder for a term of six months' service for deserting his wife and failing to support her. The law is to be applied in the case of a confirmed loafer, and an announcement of his sale is posted on the front door of the City Court House.

Ben Butler, in a case in the Massachusetts supreme court, involving damages for fatal injury—Senator Hoar being on the other side—quoted Job: "All that a man hath he will give for his life." "That," said Mr. Hoar, "was a plea of the devil in a motion for a new trial, and I don't think the court will be more impressed by it on account of its modern indorsement."

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After hearing argument in a case a rural justice said:

"I'm sorter mixed on this here metter, and I'll preserve my decision."

"About what time, jedge," said the lawyer "will you dish out them preserves?"

"Thar's no tellin'," replied his honor. "I've got a sight o' plowin' tew do, an' erbout ten acres to fence in. Jest take the pris'ner ter jail till fall!"

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Jersey City has a lawyer who, having settled an estate of $1,200 was awarded $100 for his costs and refused to take it because it was an exorbitant price.—*Chicago Law Journal.*

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The question presented by the case of Kerr, Receiver, *v.* Urie, 37 Atl. Rep. 789, before the Court of Appeals of Maryland, is whether a married woman living in one State is capable of holding stock in a national bank located and doing business in another State, and if so whether she is liable as such stockholder, under the personal liability provisions of the United States statute.

The court decided in the affirmative saying, that "whatever difficulty may surround this question arises, we think, more from the manner in which it is presented in this case than from any other cause, for it can hardly be supposed that, at this day, when, by law of most all the States, a married woman may contract as a *feme sole* in respect to her separate estate, she is without power to subscribe for or become the transferer of the stock of a national bank."—*Albany Law Journal.*

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A husband may not have a divorce when his wife left him because he suffered his mother falsely to accuse her of larceny and beat her until the blood ran. So say the Virginia court in *Hutchins v. Hutchins*, 93 Virginia, 68. The court observe that the husband is still entitled to "be obeyed and respected as long as he deserves respect and obedience." Respected, yes; obeyed, no.

And although the husband still has the right to dictate the place of their joint residence, we deny that he has any right to compel the wife to live with his mother, apart from him, while he is permanently absent in another State, carrying on business, as was the fact in this case—*The Green Bag, Wis.*

The telegraph reports a good story on Hon. J. N. Dean, of Xenia, Probate Judge of Greene county, who last week, in making out papers for committing a man by the name of J. W. Murphy, to the insane department of the county infirmary, absent-mindedly inserted his own name in the papers where that of the crazy man's should have appeared, and the mistake was not discovered until Constable Matthews presented Murphy at the infirmary. The officer then came back to town and informed the judge that he had proper papers for his commitment to a mad-house, and asked if he would go quietly or would have the handcuffs on. The judge altered the papers and grimly remarked that he would beg to be excused just now.—*Ohio Law Journal.*

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In the United States Circuit Court at Chattanooga, Judge Clark rendered a decision on the 28 ult., which will cause consternation among tax title buyers, tax collectors and lawyers. In the case of A. M. Blakely vs. The Tennessee River Transportation Company, on a question of a tax foreclosure, the judge decided that a mortgage claim, involved in the case, must have satisfaction before a tax claim so involved, and established the principle that mortgage claims should always have precedence over tax claims.

If the decision is upheld by the Supreme Court it will mean the loss of thousands of dollars to cities, counties and states in taxes.—*Chicago Law Journal.*

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The record for the transmission by long distance telephone of affidavits in an attachment case was surpassed on the 30 ult. by the sending of an affidavit from Minneapolis to New York City. The law firm of Kneeland, Thompson, Stewart & Hoelljes, 320 Broadway, received a telegraphic message from Austin, Hall & Co., of Minneapolis, stating that they had obtained an attachment against the Bank of Minneapolis for $9,000 for money deposited. The message said the bank had suspended and that it had a balance at the National Bank of Commerce of New York City which the firm desired to obtain.

The New York attorneys saw the necessity for haste and advised their clients by wire to assign the claim by telephone to some representative in that city. Arrangements were accordingly made and the telephoned affidavits were written out at the New York end, and an affidavit was made as to the identity of the voice. All these papers were attested by a notary, taken into Court, and, after being approved, placed in the hands of the sheriff for service. This prompt action tied up the funds of the Bank of Minneapolis on deposit with the National Bank of Commerce.

A member of the law firm that transacted the business claims that there can be no question as to the legality of proceedings of this nature, provided care is taken to identify the voice as heard over the telephone as that of the maker of the affidavit. The Court of Appeals has thrown out one case in which the voice was not identified, but other cases have been indorsed by the Higher Courts.

A novel and interesting phase of "the woman question" has arisen in California, says the *Albany Law Journal*, which the courts are to be called upon to adjudicate. The controversy relates to the right of a railroad company to charge a lower rate of fare to female than to male commuters. The corporation in question, whose line connects San Francisco with San Rafel, not long ago issued an order giving women a monthly rate of three dollars, while the rate for men commuters has been and is five dollars. The reason assigned by the company for this discrimination in favor of the fair sex are not at hand. The legal right of the company to create the distinction has been challenged by the men, on the ground that it violates the requirement of uniformity in rates. The railroad has set up the original plea that women are "a class," and that under the State law, which leaves it optional with a railway to discriminate with regard to "classes of freight or persons," it is entitled to make a different rate for women than for men. The court will decide the question, which, we believe, is a new one.—*The Law Times.*

## *NOTES.*

A returned letter is admissible to prove that the person to whom it was addressed did not live in the place to which it was directed, according to decision of the Court of Criminal Appeals of Texas, in Dawson v. State (41 S. W. Rep. 599).

A "vote of the people" by which city bonds may be authorized is held, in Bryan v. Stephenson (Neb.) 35 L. R. A. 752, to mean a majority of the voters of the city, and when the vote is taken at the general city election the proposition must receive a majority of all the votes cast at that election.

The Supreme Court of Wisconsin holds in Randles v. Waukesha Co., (71 N. W. Rep. 1034), that when a sheriff, having a warrant for the arrest of a person charged with larceny, takes a citizen's horse and pursues and overtakes the felon, but in so doing overdrives and injures the horse, the county is not liable for its value.

According to the decision of the Supreme Court of Rhode Island in Paddy v. Am. Ship-Windlass Co. (37 Atl. Rep. 706) an infant can make a binding contract of apprenticeship to learn a useful trade, and cannot avoid that contract on becoming of age; and if he violates it he will be bound by a clause therein providing for the retention and forfeiture of part of the wages due him.

Money paid as earnest and in part consideration of an agreement to assign a contract for the purchase of real estate cannot be recovered back, nor can the payment of a check given for such earnest money be resisted, because of infirmity of agreement under the statute of frauds, where the vendor and assignor are prepared to perform (Fleischman v. Plock, decided by the appellate term of the supreme court of New York, 17 N. Y. L. J. 37), since the ability and willingness to perform furnish a consideration for the payment, and the implication of a promise to return it accordingly fails.

A libelous publication concerning a family in its collective capacity is held actionable in favor of any member of the family, in Fenstermaker v. Tribune Pub. Co., (Utah) 35 L. R. A. 611. The case holds that a newspaper article which relates wholly to the private acts of a family with respect to cruel treatment of a child is not privileged.

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The supreme court of California has declared in Wilmerding's estate 49 Pac.Rep.181, that the collateral inheritance tax law of that state (Stat. 1893, p. 193) is not unconstitutional, though it does not tax inheritances by brothers and sisters of the deceased, while taxing inheritances by the children of such brothers and sisters, and though it exempts inheritances not exceeding $500.

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The indorsement by the maker of a note which is payable to his own order is held, in Ewan v. Brooks-Waterfield Co. (Ohio), 35 L. R. A. 786, not to be an indorser in the legal sense of the term, but only a maker, and the note is held to be in legal effect payable to the holder or bearer. In such a case an indorsement in blank by another party before the note is delivered is held to make the latter a prima facie surety of the maker.

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It is not a rule of law that the jury must view the offense of rape as one well calculated to create strong predjudice against the accused; nor that rape is an accusation easy to make and hard to be defended by an accused, though he be ever so innocent; nor is it a rule of law that the attention of the jury be specially directed to the difficulty growing out of the usual circumstances of the crime in defending against rape. These are merely arguments to be addressed to the jury by council, and the court commits no error in refusing to give them in the shape of instructions. (Doyle v. State [Fla.] 22 South. Rep. 272.)

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Judson Auten, of Clinton county, Mich., was charged with assault with intent to commit murder. On the trial the question of sanity was raised, and on the testimony of two examining physicians the court sent Auten to the asylum for the dangerous and criminally insane, at Ionia. Later the same court ordered Auten's discharge from custody, and Dr. O. R. Long, keeper of the asylum, refused to liberate the man. The attorney-general has just upheld the keeper. In cases of this kind the Michigan law provides that the prisoner shall remain in custody until his reason is restored, when the criminal case against him shall resume. If his reason be not restored he must stay in confinement.

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The opinion of the N. Y. Supreme Court, Appellate Division, by Parker, J., holding that the defendant was bound to furnish tele-

phone service to the plaintiff for a reasonable compensation, and that upon the defendant threatening to remove the instrument unless an exhorbitant and unreasonable price was paid for the telephone service, an injunction was properly granted restraining the removal of the instrument. It was also held that the plaintiff was entitled to an order to examine the officers and books of the defendant before trial, it appearing that such examination was necessary and material in order to enable plaintiff to show upon the trial whether said amount of $150 per annum would be a reasonable charge for defendant's telephone service.—*Chicago Legal News.*

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The law imposes upon the holder of a check the duty of presenting it for payment within a reasonable time; and if he fail to present the check seasonably the delay is at his own peril. A check drawn upon a bank in Greenville, Ala., was deposited on December 13, with a bank in Philadelphia, and on that day forwarded to a bank in Charleston, S. C., whence it was sent first to Montgomery, Ala., and thence to Greenville, Ala., whereby presentation was delayed until December 19. The drawee bank failed and closed its doors on December 18. Had the check been forwarded direct to Greenville, it would have reached there December 15, and in time to have been presented on the 16th. Held: that the delay discharged the drawer. The drawer of a check may prove undue delay in presenting the check under a plea of payment of the debt for which the check was given. (Watt v. Gaus, Sup: Court of Alabama, April 15, 1897.)

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The decision of the Circuit Court of Appeals in Pyle v. Clark et. al., 79 Fred. Rep., 744, well illustrates the rule adopted by the national courts regarding the duties imposed upon a traveler who approaches a grade crossing on a highway. The plaintiff, Pyle, was driving in a wagon with his friend, Wright, when they approached a grade crossing of the Union Pacific railway, operated at the time by the defendant, Clark and others, as receivers. They stopped at some distance from the track to allow a train to pass, and then drove across, looking only down the track toward the south. A train came from the north at a high rate of speed, and without warning struck the wagon and injured them both. Suits having been brought, Wright was allowed to recover, but Pyle was barred from so doing on the ground of contributory negligence.

In the decision of the case of Pyle, the driver of the wagon, Judge Sanborn lays down the following rule, which has been uniformly adopted by the national courts: "It is the duty of everyone, approaching a railroad to look both ways and to listen; and when a diligent use of the senses would have avoided the injury, failure to use them is, under ordinary circumstances, contributory negligence and should be so declared by the court."

In Bradford v. Clark and Thompson, decided by the Supreme Court of Maine (90 Me. 298), it was held that no action for slander will lie when the words alleged to be defamatory are privileged communications. The plaintiff, a supervisor of schools, was present at annual town meeting, when a proposition was pending for an appropriation of money for the purchase of more school books, and the defendants, who were voters and taxpayers, declared that "the school books had been burned" by him, one of them adding, "I can prove it," and the other, addressing the plaintiff, stated: "You, the superintendent of schools, have thrown the text-books into the stove in presence of children." It appearing that in making the imputed statements the defendants had reasonable grounds for believing they were true; that they made them in good faith, in an honest belief that they were true; that they desired definite information in regard to the charges against the plaintiff, when an explanation from him might have been entirely satisfactory; and that they were speaking to the fellow-citizens, who had a corresponding interest with themselves: Held, that the occasion was privileged. The court said in part: "It was a New England town meeting, held for the annual election of officers, for the necessary appropriation of money, and to consult upon the common good. The plaintiff was a public officer. His fidelity or efficiency in the discharge of his trust had been brought in question with reference to the preservation of school books. A proposition was pending for the appropriation of money for the purchase of more books. The defendants were voters and taxpayers in the town, having an interest in the subject-matter. They had a right to know how the money raised by taxation was being expended. In making the statements imputed to them, they were speaking to their fellow-citizens, who had a corresponding interest with themselves. It was a privileged occasion. They had reasonable grounds to believe their statements to be true. They made them in good faith in the honest belief that they were true. They had no actual malice against the plaintiff. They desired definite information in regard to the charges against him. An explanation from the plaintiff himself might have been entirely satisfactory. He seems to have preferred a lawsuit to an explanation and he must abide the result. The statements made by the defendants were privileged."—*Albany Law Journal.*

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John Hanna was a passenger on one of the lines of the Nassau Electric Railroad Company, on Bergen street, in Brooklyn, N. Y. When the car reached the intersection of Fifth Avenue he got a transfer slip entitling him to continue his journey on the line upon the avenue. When a car came along he boarded it by the front platform. He surrendered his transfer ticket, after which he was directed by officials of the road who were riding on the front platform, to enter the car. Finding this impossible, he refused to leave the plat-

form, and was then ejected from the car by force. The Second Appellate Division, in affirming judgment secured by Hanna in his suit against the company for assault, held that the court properly charged the jury that if the plaintiff's ticket had been taken from him by the conductor, and there was not sufficient room in the body of the car to permit him to enter, his ejection was illegal; but that, if there was room in the car, he was bound to enter it, his removal from the car was lawful, and the defendant was entitled to a verdict, unless excessive force was employed. A railroad corporation which has accepted a passenger's transfer ticket can not, the court said, remove him from its car until it has either returned, or tendered a return, of the ticket to him. A transfer passenger has not necessarily, it was held, the right to board the first car that approaches him on the line, regardless whether there is accommodation for him, and to force himself into a dangerous or improper position upon the car; his duty is to wait until a car approaches in proper condition to receive him, and should no such car appear, he can maintain an action against the corporation for its breach of contract to carry him. *Washington Law Reporter.*

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The question is becoming of some practical importance whether an endorser of a promissory note, whom it is sought to charge with notice of its dishonor, may be bound by such a notice conveyed to him over a telephone.

This question arose in the case of *Thompson* v. *Appleby*, Court of Appeals of Kansas, S. D., May 14, 1897, and the court expressed the following general views:

"Following comparatively recent decisions of the highest courts in several States, and on principle, we should not hesitate to hold that business communications or notices over the telephone are as binding as if the telegraph or mails were used, and that ordinarily a *prima facie* case can be made out, notwithstanding there is no proof that the one sending the notice, or relying on it in the action, knew the person receiving and answering the message was the identical person for whom it was intended, provided it be shown that both telephones were connected with the central telephone office, and that the proper number was called for, connection made, and response received upon its being called. Citing, Reed v. Railway Co., 72 Iowa, 166; Railway Co. v. Heidenheimer (Tex. Sup.), 17 S. W. 608; Wolfe v. Railway Co. (Mo. Sup.), 11 S. W. 49.

"The cases clearly declare that the use of this modern means of communication is to be recognized and welcomed by the courts, as well as by the business interests of the cities. But the doctrine of these cases cannot be applied in any general way. The facts of each case cannot be applied in any general way. To make an indorser of a promissory note liable, notice of its dishonor must be given to the indorser. When the notice is verbal, the general rule, and the only safe rule, seems to be that the holder of the note, or his

agent, shall communicate in spoken words to the endorser the fact that the note is dishonored. If the holder relies upon notice by telephone, he must show it was communicated to the indorser."

In the case before the court, wherein it was sought to charge the indorser of a promissory note, the witness charged with the duty of giving notice testified that he telephoned to the indorser's office, and that either the indorser or the latter's bookkeeper answered, he didn't know which; but whichever of the two it was, he notified them of the fact. On further questioning the witness answered that he did not recollect "whether it was either of their voices."

The court held that there was no competent evidence tending to prove that notice of the dishonor of the note was actually given to the indorser personally; and a notice by mail was also declared insufficient to charge him, the indorser living in the same town with the holder of the note. Following is the official syllabus of its decision, prepared by the court, which shows clearly what is decided in the case in hand:

1 "While a witness may ordinarily testify to a conversation had by him through a telephone with a person though he is not able to identify the voice of the person responding, yet where it is sought to charge an indorser of a promissory note with liability by notice of dishonor thus communicated, it must clearly appear that the person responding was the indorser, himself; and where the only evidence of the giving of such notice was the testimony of a witness that he called up the office of the indorser and did not know whether or not it was the indorser or his bookkeeper, or either of them, that responded, it is not error to sustain a demurrer to this testimony, as furnishing no evidence that notice of dishonor was given."

2. "Where the indorser of a promissory note resides in the same city or town with the party who is to give the notice of dishonor of the note, the rule is that the notice must be given to the indorser personally, or by leaving it at his domicile or his place of business; and a notice of protest which was sent by mail by the notary public who protested the note, furnishes no evidence as to such personal service."—*Washington Law Reporter.*

## DIGEST OF RECENT DECISIONS.

### ACCORD AND SATISFACTION.

Mere giving of the debtors check payable at a future date for amount of composition, does not discharge him from liability for the debt, unless they are paid. *Forest* v. *Davis*, 20 Misc. 1, 44 (N. Y.) Supp. 78 St. Rep. 907.

### ADVERSE POSSESSION.

One cannot prove title by possession by recitals in the deed of his grantors. *Hudgins* v. *Simons*, (Va.) 27 So 606.

Where, by mistake, a line fence is improperly placed, limitations will not run until some claim of ownership and notice thereof is brought to the owner of the legal title. *Rasdell* v. *Shumway*, (Kan. App.) 49 Pac. 631.

Possession of heirs may be tacked to that of their ancestor to show adverse possession. *Burnett* v. *Crawford*, (S. C.) 27 So. 645.

### APPEAL AND ERROR.

An order refusing to grant a new trial, is not final judgment from which an appeal will lie. *White* v. *Pease*, (Utah,) 49 Pac. 416.

The appellate term cannot review an order denying a motion for a new trial. *Jennings* v. *Kosmak*, (N. Y.) 20 Misc. 300; 45 N. Y. Supp. (79 St. Rep.) 802.

Pub. Acts 1895, C. 100, providing for statements by stenographers of the evidence, does not give the Supreme Court power to retry questions of fact. *Thresher* v. *Dyer*, [Conn.] 37 Atl. 979.

A misstatement of the amount of demand in affidavit does not invalidate the process if the mistake relates to an actual subsisting debt, and there is no intent to acquire a lien for a larger sum than justly due. *Brownald* v. *Passe*, [Ala.] 22 So. 662.

### ASSIGNMENT FOR BENEFIT OF CREDITORS.

Preferences a part of a general assignment will not necessarily destroy its validity. *Sturtevant* v. *Sarbach*, [Kan. Supp.] 49, Pac. 522.

A general assignee of a corporation, not a party to proceedings in which a receiver was appointed, cannot be ordered to surrender the assets to the receiver. *Matter of Muehlfield*, [N. Y.] 16 App. Div. 401; 45 N. Y. Supp. [79 St. Rep. 16.]

### ATTACHMENT.

An attachment is justified against one mortgaging his property to prefer creditors. *Joseph Bowling Co.* v. *Calvin*, [La.] 22 So. 374.

Where an insolvent confesses judgment to certain creditors, and denies judgment to others, it constitutes a mortgage entitling a creditor to an attachment. *Same case.*

An attachment may be be levied upon the value of work done by a contractor, although the architect has not certified to it. *Edison Electric Illuminating Co.* v. *Guastavino Fire Proof Construction Co.* [N. Y.) 16 App. Div. 350; 44 N. Y. Supp. [78 St. Rep.) 1026.

CONTRACT.

The general rule is that one who seeks to recover on a contract must show substantial performance on his part, and this rule applies to a "building contract" as to any other. But slight ommissions and inadvertences should be disregarded. Where there has been an honest effort by the contractor to perform, and not a willful omission, substantial performance is all that is required.—*Ashley* v. *Henahan*, Ohio, 47 N. E. Rep. 573.

CORPORATION.

A corporation organized for the purpose of "manufacturing and supplying illuminating and heating gas" may deal in appliances for the consumption of gas as well as for its manufacture and distribution.—*Malone* v. *Lancaster Gas Light & Fuel Co.*, Penn., 37 Atl. Rep. 932.

DEED.

A deed conveyed a fee, subject to a life estate in the grantor, and "reserving the right to occupy and use the premises as fully and freely as I might do if the fee and title was to remain in myself, with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life." The grantor warranted the title against all demands "except any claim that may arise under the reservation aforesaid:" Held, that the grantor retained the right to mortgage the fee, and not merely his life estate.—*Bouton* v. *Doty*, (Conn.,) 37 Atl. Rep. 1064.

Where there are several grantees named in a deed, each receiving a separate and defined interest, and the grantor's acknowledgment is taken by one of them, the deed must be treated as if executed separately to each of such grantees, and good as to each of them except the one taking the acknowledgment.—*Murray* v. *Tulare Irrigation Co.*, (Cal.,) 49 Pac. Rep. 563.

DIVORCE.

Where divorce is granted for extreme cruelty or adultery, and homestead is assigned to innocent party in separate property of the other, such assignment is limited to life of innocent party. *Huellmantel* v. *Huellmantel*, (Cal.) 49 Pac., 574.

Use of profane language, irrespective of its effect on the person, addressed, does not constitute extreme cruelty. *Hewitt* v. *Hewitt*, (N. J. Ch.) 37 Atl., 1011.

EJECTMENT.

Deed is evidence only of conveyance of grantor's title, and not of fact that he had title. *Malone* v. *Ahrnds*, (Ala.) 22 So. 500.

Where the vendor wrongfully re-entered because of non-payment of price, held, that the purchaser might maintain ejectment. *Usher* v. *Hollister*, (Kan. Supp.) 49 Pac. 466.

Plaintiff in ejectment cannot recover where he shows no title, whether defendants title be valid or not. *Stephens* v. *Moore*, (Ala.) 22 So. 542.

ESTOPPEL.

The holder of vendor's lien held estopped to assert is, where he was present at the foreclosure sale, and stated that he had no claim. *Hoots* v. *Williams*, (Ala.) 22 So. 497.

A debtee, after the surrender of mortgaged land to mortgagee, held not estopped to demand possession on tender of the amount of the debt. *McAbee* v. *Harrison*, (S. C.) 27 S. E. 539.

A wife who treats her husband as trustee, and allows him to bring actions for recovery of real estate, held bound thereby. *Benbow* v. *Levi*, (S. C.) 27 S. E. 655.

EQUITY.

Equity has no jurisdiction of an action to recover real property, including damages for its detention. *Hughes* v. *Hannah*, (Fla.) 22 So. 613.

After a decree *pro confesso* has been regularly entered against a defendant in a chancery cause, he so far loses his standing in the court as not to be entitled to notice or hearing in the future peoceedings. *Price* v. *Boden*, (Fla.) 22 South. Rep. 657.

An attachment creates a lien on the property from the time of the service of the order of attachment. *R. T. Davies Mill Co.* v. *Bangs.* [Kan. App ] 49 Pac. 628.

Where part of the debt is due and part not due, attachment will not be quashed. *Hubbard* v. *Haley,* [Wis.] 71 N. W. 1036.

An attachment cannot issue against the president of a joint stock association located in France. *Mertz* v. *Fenouillet,* 13 App. Div. 222; 43 N. Y. Supp. [77 St. Rep.] 217.

BAIL.

One released on bail cannot, after conviction and sentence, on reversal of judgment, be released by virtue of the former bail bond. *Ex parte Williams,* [Ala.] 22 So. 446.

BANKS AND BANKING.

Where a subscriber for stock in a national bank transfers it to his wife, she is subject to stockholders liability. *Kerr* v. *Urie,* [Md.] 37 Atl. 789.

A bank has not a lien on the deposit of a customer for his matured debt, though he be insolvent. *Homer* v. *Bank of Commerce,* [Mo.] 41 S. W. 790.

Money deposited in one bank to another account, with directions to the latter to pay the amount thereof by telegram to a third bank, is a specific deposit, which may be recovered in full, as against general creditors. *Montague* v. *Pacific Bank,* [81 Fed.] 602.

BOND.

A bond is executed on its delivery, and not at the time it is signed. *Forest* v. *Leonard,* [Ala.] 22 So. 481.

Sureties on probate judge's bond held not liable for judge's failure to account for ward's funds intrusted to him by guardian. *Tallman* v. *Drake,* [Ala.] 22 So. 485.

CARRIERS.

Where one in charge of live stock walked on top of cars, and as a result was injured, held that he could not recover. *Nelson* v. *Southern Pacific Co.* [Utah] 49 Pac. 644.

A valid contract may be made exempting a common carrier free from negligence from liability for loss by fire. *Schaller* v. *Chicago & N. W. Ry. Co.,* [Wis.] 71 N. W. 1042.

Where cotton was received by a railway company for transportation, and a portion thereof was not delivered at the place of destination, any error in allowing witnesses to testify, in an action for the value of the portion not delivered, as to the highest price of cotton between the date of the delivery the remainder thereof and the time of the trial, was cured by charging that, if plaintiffs were entitled to recover, their damages would be the value of the cotton lost, at the time it should have been delivered.—*Hipp* v. *Southern Ry. Co.,* S. Car., 27 S. E. Rep. 623.

Where a bill of landing unconditionally directs the carrier to deliver the goods to the consignee named, the carrier is not guilty of negligence by doing so, without requiring the production of the bill of landing, so as to render it liable to the consignor for the goods, because he attached to the bill of landing a sight draft on the consignee, and sent it to a bank for collection, in the absence of notice to the carrier of such draft.—*Nebraska Meal Mills* v. *St. Louis S. W. Ry. Co.,* [Ark.] 41 S. W. Rep. 810.

Plaintiff, in an action against a carrier for selling a ticket to his wife to the wrong station, whereby she was compelled to wait among strangers for a week for money from him with which to continue her journey, cannot recover for mental suffering, where she was not mistreated in any way, received no personal injury, was not made sick, nor her health in any manner impaired, and there was no direct proof of such suffering.—*Texas & P. Ry. Co.* v. *Armstrong,* [Tex.] 41 S. W. Rep. 833.

CERTIORARI.

Where the case presented is one appealable, the writ will not be granted. *State* v. *Rost* [La.] 22 So. 421.

When the court the proceedings of which are sought to be reviewed has jurisdiction of the controversy, and there is remedy by appeal from the judgment, there is no basis for the writs of *certiorari* or prohibition.—*State* v. *Wilder,* [La.] 22 South. Rep. 661.

FIXTURES.

Machines adapted to defendants business of wood working, placed and fastened to its mill, held fixtures. *Lee* v. *Hubschmidt Building & Wood Working Co.*, (N. J. Ch.) 37 Atl. 769.

Where defendant purchased land to which a boiler was attached, without actual notice that it was subject to a chattel mortgage, held that this title was not affected by the mortgage. *Ice Sight & Water Co.* v. *Lone Star Engine & Boiler Works*, (Tex. Civ. App.) 41 S. W. 835.

FRAUDULENT CONVEYANCES.

A sale by an insolvent at a fair price, part being paid in cash and part by paying claims, held not fraudulent. *Eufaula Grocery Co.*, v. *Pettu*, (Ala.) 22 So. 505.

That a creditor paid an insolvent 50 cents on the dollar of the invoice price held not conclusive evidence of fraud.—*Fly* v. *Screeton*, (Ark.) 41 S. W. 764.

A conveyance of a homestead cannot be in fraud of creditors.—*Patnode* v. *Darveau*, Mich.) 71 N. W. 1095.

Parent and Child.—The fact that a deed was executed and delivered to a grandchild, who had rendered services to the grantor both before and after becoming of age, does not raise a presumption of a valid consideration for the deed, as against creditors of the grantor, where the relation of parent and child existed between grantor and grantee.—*Dodson* v. *Severs*, (N. J.,) 38 Atl. Rep. 28.

Where a creditor's bill contains such allegations of fact that the court can see that there is no remedy at law, or that such remedy is wholly inadequate, or shows that the creditor claims a trust in his favor, and that the relief can only be made available in a court of chancery, the court will not require him in the first instance to obtain an empty judgment and fruitless execution, as a condition precedent to entertaining his bill.—*Early Times Distillery Co.*, v. *Zieger*, (N. Mex.,) 49 Pac., Rep. 723.

A debtor, knowing that he would soon die, executed a deed to his brother, which recited as a consideration the agreement to pay a mortgage of $400 and a note of $250. Oral evidence showed that there was a further consideration of the extinguishment of a debt to the grantee of $408, and a promise to pay a debt of $125 to a third brother. The four sums did not exceed the value of the land: Held, that there was no fraud in the transaction, as against the grantor's other creditors.—*Kincaid* v. *Irvine* (Mo.) 41 S. W. Rep. 963.

GARNISHMENT.

A gave a chattel mortgage to B. to secure an indebtedness upon a stock of goods of value largely in excess of the amount of the debt, and B. takes possession of the same upon a failure to perform the obligations of the mortgage on the part of A. C., another creditor of A brings an action of garnishment on his claim, and serves a garnishment summons upon B, while in the possession of said goods. D, still another creditor, brings another action of attachment, under which the sheriff takes the goods: Held, that the lien of the garnishment is prior and superior to that of the later attachment.—*R. T. Davis Mill Co.* v. *Bangs*, (*Kan.*,) 49 Pac. Rep. 628.

GUARANTY.

Time is the essence of a guaranty to take back and pay the par value of stock upon January 1, 1895; hence the makers of such a guaranty are not bound to pay for the stock tendered after said date.—*Cabot* v. *Kent*, (R. I.) 37 Atl. Rep. 945.

GUARDIANSHIP.

In a suit involving an account of the guardianship of a decedent, the administrator of the guardian is a necessary party.—*Brassell* v. *Silva*, (S. Car.,) 27 S. E. Rep. 622.

HOMESTEAD.

Where father is compelled by sickness to leave homestead, and his children find shelter elsewhere, it is not such an abandonment, as to deprive his children of rights therein.—*Mealey* v. *Lipp*, (Tex. Civ. App.) 40 S. W. 824.

A husband cannot estop himself and wife from asserting right of homestead by taking a lease from a third person. *Datson v. Barnett*, (Tex. Civ. App.) 40 S. W., 99.

Land not being the residence of the owner or used in connection with or selected by him for a homestead, is not exempt.—*Gammett* v. *Starrs*, (Utah) 49 Pac. 642.

Homestead once acquired continues to be such until the owner changes its character by disposing of it or leaving it with the intention to permanently abandon it as his homestead, and the acquirement of another residence without the intention of making it a homestead does not of itself constitute a permanent abandonment of the original homestead.—*Baum* v. *Williams*, (Tex.,) 41 S. W. Rep. 840.

A mortgage given upon the homestead without the joint consent of husband and wife is void. The alienation of a homestead after it has once been established is such a personal privilege as cannot be delegated by either the husband or wife to the other. There has been a guide thrown not only around the wife, but also around the husband. The doctrine of unity between husband and wife has been solemnly declared in the constitution, and the homestead cannot be alienated without their joint consent.—*Locke* v. *Redmond*, (Kan.) 49 Pac. Rep. 670.

While the law is well settled that a temporary absence in search of health or pleasure, or on another place for purposes of business, will not deprive the homestead claimant of his right, unless it be apparent that there was a design of permanent abandonment, yet it is equally well settled that a permanent abandonment of the homestead as a *bona fide* home and place of permanent abode strips it of its homestead character, and deprives the claimant of the right to exempt it from sale for its debts.—*Murphy* v. *Farquhar*, (Fla.) 22 South. Rep, 681.

HOMICIDE.

One atiacked in his own house, does not have to retreat to justify killing his assailant. *People* v. *Lewis*, (Cal.) 48 Pac. 108.

Murder in the second degree and manslaughter held not included in murder in committing rape.—*Morgan* v. *State*, (Neb.) 71 N. W. 788.

If one resisting arrest by an officer who has no authority to arrest him, has ground to believe that he is in danger of death or great bodily harm, he can take the life of the officer.—*Hughes* v. *Commonwealth*, (Ky.) 41 S. W. 294.

To render a statement admissable as a dying declaration, it is only necessary that deceased had no expectation of surviving the injury.—*State* v. *Dalton*, (R. I.) 37 Atl., 673.

Where a person is killed in pursuance of a common unlawful design, it matters not who fired the fatal shot. *State* v. *Cannon*, (S. C.) 27 S. E. 528.

HUSBAND AND WIFE.

Alimony allowed a wife pending suit for separate maintenance may be increased or diminished as necessary.—*Brindley* v. *Brindley*, (Ala.) 22 So. 448.

A wife cannot make land her separate property, where the purchase is entirely on credit. *Harrison* v. *Manur-Tibbitts Implement Co.*, (Tex. Civ. App.) 41 S. W. 842.

A woman living with her husband is not entitled, in an action for damages, to recover for money paid for medical attendance.—*State* v. *City of Detroit*, (Mich.) 72 N. W. 8.

A husband need not be a party to a partition suit against his wife.—*Estes* v. *Nell*, (Mo.) 41 S. W. 940.

Husband and wife may hold personal property in common, and where an agreement of sale to them of such property, does not state their respective interests, they are presumed to have equal shares.—*Baumann* v. *Guion*, (N. Y.) 21 Misc. 120.

INDICTMENT AND INFORMATION.

An indictment need not state the title of the court with whose jurisdiction the offense occurred. *State* v. *Daniel*, (La.) 22 So. 415.

NEGLIGENCE.

No action of negligence will lie when the defendant's negligence has no casual connection with the plaintiff's injury. When the defendant's act or omission is not the real or proximate cause of the injury, but only affords the

occasion for a purely accidental occurrence, causing damage without legal fault on the part of any one, no action can be maintained. *Conway* v. *Lewiston & A. Horse R. Co.*, (Me.) 38 Atl. Rep. 110.

PARTNERSHIP.

A note executed by a managing partner in his own name for supplies for the firm, and indorsed by him in the firm name, is a firm obligation. *Patterson* v. *Swickard*, (Ky.) 41 S. W. 435.

PRINCIPAL AND AGENT.

Where an agent sold goods without disclosing his principal, and the principal understood from the buyer's statements that they had paid the agent therefor, the bringing of suit by the principal against the agent was no defense to a subsequent action by the principal against the buyers. *Bertoli* v. *Smith*, (Vt.) 38 Atl. Rep. 76.

RAILROADS.

Where the owner of the fee of land incumbered with a lien for purchase money conveys a right of way over it to a railroad company, which takes possession and constructs its road under such conveyance, all the lienor can claim is full compensation for the land appropriated, and he is not entitled to sell the land with the improvements thereon, in satisfaction of the lien. *First Nat. Bank of Gadsen* v. *Thompson*, (Ala.) 22 South. Rep. 668.

## *BOOK REVIEWS.*

STATE CONTROL OF TRADE AND COMMERCE, by ALBERT STICKNEY, of the New York Bar. Bar. Published by Baker, Voorhis & Co., 66 Nassau street, New York. Price, $2.25 net, but sent, express paid, on receipt of price. Finely bound in art canvas.

This is an exceedingly interesting work not only for lawyers but all others who have become interested in the discussions which have of late years been had on the subject of contracts of employment, public and private.

While the readers may not altogether agree with some of the author's ideas of political economy, he cannot fail to commend, if a lawyer, the manner in which he has discussed and criticised some of the decisions of the courts, notably the cases of the *People* v. *Sheldon*, 139 (N. Y.) page 251, and the *United States* v. the *Trans-Missouri Freight Association*, 166 (U. S.) page 290, cases which "held that a mere contract which provides that the rates or prices for traffic or merchandise, shall be fixed by one common authority for all the contracting parties, and which thereby prevents competition between the contracting parties, there being no interference with any lawful right of any other party, unless the mere agreement be such, constitutes a crime.

The author treats of the efforts which have been made to control trade by legislation and judicial decisions, and traces the growth of distinction between public and private employments, and shows the development and tendency of the law both in England and the United States.

We advise those of our readers who desire to investigate the subject of the authority of the courts to deal with the so-called trusts and trust agreements made by the great corporations within recent years, as well as those interested in the questions of economic science involved in the discussions of the snbject, to read this work.

# MICHIGAN LAW JOURNAL.

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## *THE LAW OF TRADE-MARKS.*

BY CHARLES F. BURTON OF THE DETROIT BAR.

The use of trade-marks is of unknown antiquity, but it has only been within comparitively modern times, dating back not more than one hundred and fifty to two hundred years, that the courts of England and of this country have come to so recognize the rights of users of trade-marks that they found it possible to protect those rights and prevent the fraudulent use by others of the trade-mark that one man had adopted.

In the early history of the growth of trade-mark law, the courts seemed to be able to protect the rigths of the owner of the trade-mark only by asserting a right to protect the general public or the purchasers rather than the owner, and the expression is frequent in the earlier decisions, and not uncommon in very modern decisions, that the courts would protect the public or the purchaser from being imposed upon and led to purchase an article made or exposed for sale by one dealer when he thought he was purchasing that of another, the court finding itself more powerful to protect a purchaser against fraud than it was to protect the owner of the trade-mark against the wrongful appropriation of his property.

The doctrine of ownership or property rights in a trade-mark seems to have been of slow growth; but it is now firmly established that an individual may have a proprietary interest in a trade-mark

that has been adopted by him and used by him in commerce in connection with tangible property. This proprietary right extends not only to trade-marks proper, but to many other analogous rights, such as the proprietary right to a distinctive label or a distinctive package or wrapper or envelope in which goods are sold or exposed for sale.

The proprietary right which a corporation has to its name, the proprietary right which a merchant has to a particular name under which he is carrying on business, the right which the publisher of a paper has to the name by which he heads his paper,—while none of these latter are, strictly speaking, trade-marks, the general rules of law which protect trade-marks proper have been extended and apply to all of them, and they may all be classed under the general head of trade-marks.

A trade-mark, properly speaking, consists of some designating character, symbol or word, which an individual adopts and uses in connection with merchandise that is sold or exposed for sale. This designating character, symbol or word, may be of almost any kind, there being only a few exceptions to the general rule that a merchant may adopt or use as a trade-mark anything which he can associate with the goods sold under it that in course of time it comes to indicate, to whomsoever sees it, or perhaps to whomsoever hears its name spoken, that the goods that accompany it are made, produced or prepared by a certain individual or at a certain place. The mark thus comes to indicate the same thing that a long explanation on the label or by the seller might make plain, and to indicate at once to the eye or to the ear the source or origin of the goods accompanying it. The purchaser may be entirely ignorant of the actual manufacturer, but he comes to associate the goods and the trade-mark together in such a way that he understands when he sees the goods a second time that they are of the same make as those which he had previously seen, or perhaps those which he has previously only heard of. The mark thus becomes an assurance of quality. It indicates not only origin, but similarity in quality with other goods bearing the same trade-mark.

While, in general, one may adopt and use almost any character, symbol or word as a trade-mark, there are some few exceptions, and these few exceptions almost all of them relate to such characters, symbols or words that are, so to speak, common property, and not capable of adoption and isolation to any one person. For example, while a person has a right to use his own name, and to use his

own name in connection with the goods he exposes for sale, there are usually many persons of the same or a very similar name, and another person bearing the same name would have an equal right to use that name in connection with the goods sold by him, and if the two were selling goods of the same kind, each would have the right to sell under his own name. Thus, it would be improper to allow either to adopt his own name as a trade-mark to the exclusion of others bearing the same name. He can, however, so arrange the form and appearance of his name that it will constitute a trade-mark. Again, if one takes as a symbol the name of the place in which he is located, he takes that which may be taken with equal right by any one who is located in the same place and carrying on a similar business. Consequently, the name of a place cannot be adopted, generally speaking, as a trade-mark. There are to be found, in adjudicated cases some in which the name of a place has been sustained as a trade-mark, but in all of these cases I think it will be found on careful examination that the place took its name from the trade-mark previously adopted, rather than that the trade-mark was adopted from the name of the place. Thus, "Durham" is the name of a place in Virginia where there is made a certain grade of tobacco sold under the name of "Durham" tobacco; but, in this instance, the place was an outgrowth of the manufacturing interests which were established after the trade-mark was adopted. The words "St. Louis" as applied to beer exported from St. Louis, Mo., was protected as against one who put up beer in New York and exported it as "St. Louis Lager Beer". In another instance the word "Angosturo" came to be used as the name under which a certain medicine was sold. The name "Angosturo" was the name of a place, but the place was of small importance and but very little known, whereas the medicine was widely known. The word "Brooklyn" was claimed in one instance as a trade-mark, but it was held that anyone living in Brooklyn or carrying on manufacture in Brooklyn, would have an equal right to use the word. "Lackawana" was considered not capable of adoption as a trade-mark in connection with the coal of any particular dealer, since it could with equal proof be given as a name of any coal produced in the Lackawana Valley. Generally speaking, then, the name of an existing place cannot be adopted as a trade-mark.

A name or word which designates the character or quality of the article which is sold under it, cannot be adopted as a trade-mark. It sometimes requires considerable discrimination to determ-

ine whether the word which is adopted and sought to be used as a trade-mark is in reality descriptive of a character or quality, and in this case also, a word which is originally adopted as a trade-mark may come, in time, to so designate the article, that it seems to be indicative of quality, whereas, in fact, it is not. For example, the word "Mackintosh" is now well-known as the name of a particular preparation of cloth and India rubber. It is, nevertheless, a proper trade-mark, because, although we understand at once that it means a certain kind of rubber coated cloth, it is not indicative of any quality of the cloth. So also, the word "celluloid" now universally understood to mean a particular kind of pyroxylin, was originally adopted as a trade-mark for a new manufacture of pyroxylin, and having once been, properly speaking, a trade-mark, it does not lose that quality, because the general sense of the community comes to understand that a certain thing is meant when the word is heard or seen. On the other hand, "bromo-caffeine" was held not to be a proper trade-mark, because the two components indicated that the article sold under it was a mixture of bromine and caffeine. So also, "Syrup of Figs" although held by one court in California to be a proper trade-mark, has been held by the appellate court to be an improper trade-mark, because descriptive of the quality of the article sold under it.

A word which is not descriptive of the article, but which would be descriptive if it would be true when asserted of the article, is not a proper trade-mark, because it suggests a falsehood; as, for example, the attempt to use "Syrup of Figs" was held to be not a proper trade-mark if the goods sold under it contained a syrup of figs, because descriptive; and not a proper trade-mark if the goods sold under it contained no syrup of figs, because then it suggested an untruth. So also, the words, "Balm of a Thousand Flowers" used in connection with a perfume in which there were no flower essences, was held not to be a proper trade-mark, because it suggested an untruth.

Business names,—while these are not trade-marks, they are treated of under substantially the same rules,—they are not trade-marks, because not used in connection with goods that are sold. A hotel keeper may be in a sense a merchant who deals in a class of goods—the hotel name is not however used with those goods in the way that a trade-mark is used, and when one has adopted a name for a hotel which he is conducting, he will be aided by the court in preventing another from using the same name or a similar name

in the same neighborhood. The same rule applies to a name adopted in connection with a class of manufacturing—as for example, the "Taper Sleeve Pulley Works" was considered a trade-mame, the exclusive right to which was acquired by the first use of it.

A corporate name is usually protected by the state statutes; but where this is not the case, the first organized can prevent the unauthorized use of the name.

The nom de plume of an author is not a trade mark, and one who has adopted such name cannot prevent another from using it.

In every case there is one crucial test,—is the action of the alleged private one calculated to defraud the public, and because of such fraud calculated to injure the complaining party, the element of the fraudulent intent being to acquire the trade which another has built up.

In using the word "fraud", however, we must give to it its legal meaning which is somewhat different from its commonly accepted meaning, in that the term includes not only acts done with an *actual* fraudulent intent, but also such acts as (although not originating in any evil design to defraud or injure another) have a tendendy to deceive and are therefore deemed worthy of repression equally with frauds of the more grave and palpable sort.

3 Blackstone Ch. 17.

(To be continued.)

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NOTE: The next article will treat of the origin or way in which title to trade-marks is acquired.

## *JUDGE FIELD'S RESIGNATION.*

It has been publicly known for some time that Justice Stephen J. Field, owing to his advanced age, and failing health, would soon resign his seat on the bench of the Federal Supreme Court, and the venerable jurist recently notified the members of the court, in a letter penned by himself, that his resignation sent to the President some months ago, had been accepted, and that he would retire on December 1st.

Following is Judge Field's letter to the court:

"Supreme Court of the United States, Washington, D. C., Oct. 12, 1897.—Dear Mr. Chief Justice and Brethren: Near the close of last term, feeling that the duties of my office had become too arduous for my strength, I transmitted my resignation to the president, to take effect on the first day of December next, and this he has accepted, with kindly expressions of regard, as will be seen from a copy of his letter, which is as follows:

"Executive Mansion, Washington, D. C., Oct. 9.—The Hon. Stephen J. Field, Associate Justice of the Supreme Court of the United States, Washington, D. C.—My Dear Sir: In April last Chief Justice Fuller, accompanied by Mr. Justice Brewer, handed me your resignation as Associate Justice of the Supreme Court of the United States, to take effect Dec. 1, 1897.

" 'In hereby accepting your resignation, I wish to express my deep regret that you feel compelled by advancing years to sever your active connection with the court of which you have so long been a distinguished member.

" 'Entering upon your great office in May, 1863, you will, on the first of next December, have served upon this bench for a period of thirty-four years and seven months, a term longer than that of

any member of the court since its creation, and throughout a period of special importance in the history of the country, occupied with as grave public questions as have ever confronted that tribunal for decision.

"'I congratulate you, therefore, most heartily upon a service of such exceptional duration, fidelity and distinction. Nor can I overlook that you received your commission from Abraham Lincoln, and, graciously spared by a kind Providence, have survived all the members of the court of his appointment.

"'Upon your retirement both the bench and the country will sustain a great loss, but the high character and great ability of your work will live and long be remembered, not only by your colleagues, but by your grateful fellow countrymen.

"'With personal esteem and sincere best wishes for your contentment and happiness during the period of rest which you have so well earned, I am, dear sir,

"'Very truly yours,

"'WILLIAM MCKINLEY.'

"My judicial career covers many years of service. Having been elected a member of the Supreme Court of California, I assumed that office on October 13, 1857, holding it for five years, seven months and five days, the latter part of the time being Chief Justice. On the 10th of March, 1863, I was commissioned by President Lincoln a Justice of the Supreme Court of the United States, taking the oath of office on the 20th day of the following May. When my resignation takes effect my period of service on this bench will have exceeded that of any of my predecessors, while my entire judicial life will have embraced more than forty years. I may be pardoned for saying that during all this period, long in comparison with the brevity of human life, though in retrospect it has gone with the swiftness of a tale that is told, I have not shunned to declare in every case coming before me for decision, the conclusions which my deliberate convictions compelled me to arrive at by the conscientious exercise of such abilities and requirements as I possessed.

"It is a pleasant thing in my memory that my appointment came from President Lincoln, of whose appointees I am the last survivor. Up to that time there had been no representative here of the Pacific coast. A new empire had risen in the West, whose laws were those of another country. The land titles were from Spanish and Mexican grants, both of which were often overlaid by the claims

of the first settlers. To bring order out of this confusion Congress passed an act providing for another seat on this bench, with the intention that it should be filled by some one familiar with these conflicting titles and with the mining laws of the coast, and as it so happened that I had framed the principal of these laws and was, moreover, Chief Justice of California, it was the wish of the senators and representatives of that State, as well as those from Oregon, that I should succeed to the new position.

"At their request Mr. Lincoln sent my name to the Senate and the nomination was unanimously confirmed. This kindly welcome was extended in March, but I did not at once enter on the discharge of the duties of the office for the reason that, as Chief Justice of California, I had heard arguments in many cases in the disposition of which, and especially in the preparation of opinions, it was fitting that I should participate before leaving that bench; and I fixed the 20th of May as the day on which to take, as I did, the oath, because it was the eighty-second birthday of my father, who indulged a just pride at my accession to this exalted position.

"At the head of the court, when I became one of its members, was the venerable Chief Justice Taney, and among the associate justices was Mr. Justice Waite, who had sat with Chief Justice Marshall, thus constituting a link between the past and the future, and, as it were, binding into unity, nearly an entire century of the life of this court. During my incumbency three chief justices and sixteen associate justices have passed away, leaving me precious remembrances of common labors and intimate and agreeable companionship.

"When I came here the country was in the midst of war. Washington was one great camp, and now and then the boom of cannon could be heard from the other side of the Potomac. But we could not say '*inter arma silent leges*.' This court met in regular session, never once failing in time or place, and its work went on as though there were no sound of battle. Indeed, the war itself simply added to the amount of litigation here as elsewhere. But the war ended in a couple of years and then came the great period of reconstruction and the last amendments to the Federal Constitution. In the effort to re-establish the nation, to adjust all things to the changed political, social and economic conditions, questions of far-reaching import were developed—questions of personal liberty, of constitutional right, which, after oft times heated discussions before the people and in the halls of Congress, came to us for decision. I

do not exaggerate when I say that no more difficult and momentous questions were ever presented to this or any other court. I look back with pride and joy to the fact that I was permitted to take part in the consideration of all those important questions, and that not infrequently I was called upon to express the judgment of this court thereon. And now that those times of angry debate, deep feeling and judicial decision have passed, it is pleasant to realize that the conclusions announced by this court have been accepted, not simply of necessity, as so prescribed by the fundamental law, but, in the main, as in themselves both correct and wise.

"As we all know, the period of war was followed by one continuing event to the present time of marvelous material development. Wealth accumulated—such as was never before dreamed of in this country. Gigantic enterprises were undertaken and carried through. Inventions have multiplied the conveniences of life, as well as the possibilities of achievement. Indeed, the conditions of life have essentially changed from those that prevailed prior to the war. Out of this changed social and economic condition have sprung not merely an immense multitude of cases, but litigation of a character vitally affecting the future prosperity and safety of this country. To this court have come for final solution and decision many of these questions and cases. By the blessings of Almighty God, my health and life have been preserved, and I have been enabled to take part in the consideration of all these cases. Few appreciate the magnitude of our labors. The burden resting upon us for the last fifteen or twenty years has been enormous. The volumes of our reports show that I alone have written 620 opinions. If to these are added fifty-seven opinions in the Circuit Court, and 365 prepared while I was in the Supreme Court of California, it will be seen that I have voiced the decision in 1402 cases.

"It may be said that all of our decisions have not met with the universal approval of the American people, yet it is to the great glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions and demonstrates that the people of the United States are capable of self-government.

"As I look back over the more than a third of a century that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a republican government. But it is the most democratic of all. Senators represent their States

and representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.' It has, indeed, no power to legislate. It can not appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safety of a popular government, and it is an additional assurance when the power is in such hands as yours.

"With this I give place to my successor, but I can never cease to linger on the memories of the past. Among the compensations for all the hard work that a seat on this bench imposes have been the intimacies and friendships that have been formed between its members. Though we have often differed in our opinions, it has always been an honest difference, which did not effect our mutual regard and respect. These many years have indeed been years of labor and of toil, but they have brought their own rewards, and we can join in thanksgiving to the author of our being that we have been permitted to spend so much of our lives in the service of our country. With profound respect and regard, I am, my dear brethren, very sincerely and always yours,

STEPHEN J. FIELD."

Following is the courts reply:

"Supreme Court of the United States, Washington, D. C., Oct. 13.—Dear Brother Field: We are profoundly moved by the letter in which you announce to us your retirement from the bench. The termination of a judicial career of such length and distinction can not fail to inspire among all your countrymen, and, indeed, wherever the realm of jurisprudence extends, a keen sense of loss, which to your colleagues assumes the aspect of a personal bereavement. For the intimacy necessarily incident to the conduct of work so constant, so exacting, and of such vital importance as ours inevitably draws us together by ties of the closest character, which can not be dissolved without emotions of deep sadness and regret. We feel that our parting involves not simply the deprivation of the assistance afforded by your learning, your vast experience, and your earnestness in advocacy of your convictions, but the severance of those relations which have contributed so much to lighten the hardest labors of the road.

"This is not the time or place to dwell on the reputation you have achieved as a jurist. The record is made up and may safely be committed to the judgment of posterity. But we can not part with you as an active member of the court without the fervent expression of the hopes that you may be spared for many years to enjoy the repose you have so thoroughly earned and the commendation bestowed on good and faithful service. We are, dear Brother Field, your affectionate brethren.

"MELVILLE W. FULLER,
"JOHN M. HARLAN,
"HORACE GRAY,
"DAVID J. BREWER,
"HENRY B. BROWN,
"GEORGE SHIRAS, JR.,
"E. D. WHITE,
"R. W. PECKHAM."

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The *Albany Law Journal* prints the following letter addressed to Judge Field by John F. Dillon of New York, one of the leaders of the American Bar.

NEW YORK, Oct. 16, 1897.

"MY DEAR MR. JUSTICE FIELD: An event so important in your life, to the profession and the country, as your retirement from the bench of the Supreme Court, I cannot allow to pass without an expression of the deep sensibility with which I heard of its announcement. We knew that in the course of nature it must occur at no very distant period, but it is one of those events for which we are never fully prepared, to which we are never quite reconciled, and which we cannot but profoundly regret. To a service of unequalled duration, through a period of unequalled importance in our civil and constitutional history, it is distinction enough to satify the highest ambition that your labors have shed additional splendor upon a tribunal, the most august in the world, which has been made illustrious by Marshall, Story, Taney, Curtis, Miller, and many eminent associates. This destinction, by universal consent, is justly yours.

"I shall not in this friendly note enter upon a review of your judicial career. It sufficeth to say that so long as our Constitution shall endure, so long as individual liberty and government by law

shall be prized, so long as jurisprudence shall be regarded as the highest interest of men and nations, your name and services will be gratefully remembered. Speaking in the language of our profession, the future holds your fame in sure reversion, in perpetuity.

"Upon the retirement of Lord Mansfield after thirty-two years' service as chief justice of King's Bench, Lord Erskine, on behalf of counsel practicing in his court, presented him with an address, wherein, after expressing their regret at the loss of so great a magistrate, he added some reflections which seem to me to be equally applicable to your retirement after even a longer service. He said:

" 'But while we lament our loss, we remember with peculiar satisfaction that your lordship is not cut off from us by a sudden stroke of painful distemper, or the more distressing ebb of those extraordinary faculties which have so long distinguished you among men; but that it has pleased God to allow to the evening of a useful and illustrious life the purest enjoyments which Nature has ever allotted to it—the unclouded reflections of a superior and unfading mind over its varied events; and the happy consciousness that it has been faithfully and eminently devoted to the highest duties of human society in the most distinguished nation upon earth. May the season of this high satisfaction bear its proportion to the lengthening days of your activity and strength.'

"What more needs be said? and who can say it with more felicity of speech?

"I am, my dear justice, as ever,

"Most sincerely yours,

JOHN F. DILLON.

"*Mr. Justice Field, Washington, D. C.*"

# MICHIGAN LAW JOURNAL.

The Michigan Law Journal is a monthly record of the Law and the Lawyers.
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ROBERT T. SPEED, Editor.

## *EDITORIALS.*

Governor Pingree thinks the Circuit Judges should "get out and hustle on election day. We think it is very creditable to them that they did not.

The adoption of the new rule by the Supreme Court requiring cases involving less than five hundred dollars, and all motions to be submitted on briefs has not met with the general approval of the bar. Motions include cases in which Writs of Mandamus and Prohibition are issued, also cases heard upon certiorari to the Circuit Court.

The moving party unless he is present in Lansing on the return day, does not know what reply or answer will be made and is therefore compelled to make his brief without such knowledge, and the respondent, as the moving party is not required to serve a copy of his brief, does not know the position taken by his adversary upon the question of law.

Mandamus cases include some of the most important questions decided by the Court, and often are controversies involving large sums of money, nevertheless they are classed with cases "involving less than five hundred dollars," and all such cases, no matter how important may be the issue to the public or to individuals, must be heard upon briefs.

"Numerous remedies have been suggested," says *The Yale Law Journal*, "to raise the standard of legislation and make it more worthy of respect. That of the Pennsylvania Bar Association is a simple and practical remedy for one phase of the evil. It is, in a word the appointment of a commission to revise and pronounce upon proposed laws, such commission to be composed of three members who are to have the qualities of justices of the Supreme Court. This measure would insure a more clear, concise and effective expression of intention, and, so far would be invaluable; and such a commission would undoubtedly arrest much of what is incompetent and ineffective in legislation." There has been some talk of creating such a commission in this state, and we think the idea a commendable one.

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We cannot agree with Governor Pingree that the salary paid the Supreme Court Judges is too high. There is a standard by which to measure salaries, and we judge of that standard by the position a man occupies, the nature of his duties, the manner in which he performs them, and the length of time required to perform them. We think it will be conceded that the position of a Supreme Court Judge is the most important under the state government; that the duty imposed upon them of deciding finally, controversies between man and man, is an important one, far more important than that imposed upon any other public official; that the personnal of the Supreme Court of Michigan is equal to that of any court in the land; and that the Judges of this Court must of necessity, in order to dispose of the vast number of cases heard by them, work from ten to twelve or fourteen hours a day.

Some official salaries are too high others too low, mostly too high. But we think it will be conceded by everyone who has taken time to think about the matter that $7.000 is none too much for a judge of the Supreme Court. We think they earn every dollar of it, the Governor's opininon to the contrary notwithstanding.

## LEGAL MISCELLANY.

The United States Supreme Court has granted the request of the Attorney-General of California to advance the hearing of the Durrant murder case. Arguments will be heard November 15th.

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A Kansas City justice of the peace announces that he will furnish opera tickets with every certificate of marriage as long as he is on the bench.

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"Here," roared the old judge to the son studying law with him, "you told me you had read this work on evidence and the leaves are not cut." "Used X-rays," yawned the versatile son, and the judge chuckled with delight as he thought what a lawyer the boy would make.

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Attorney (sternly)—"The witness will please state if the prisoner was in the habit of whistling when alone?"

Witness—"I don't know. I was never with the prisoner when he was alone."

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Justice Smyth of the Supreme Court decided in Mary P. Potter's suit for a divorce from the Rev. Daniel C. Potter, that the plaintiff's statement in her bill of particulars, that the woman with whom her husband had been guilty of adultery was "a woman five or six feet high, wearing the ordinary apparel of a woman," was insufficient, and directed her to file a further bill of particulars, giving a more detailed description.—*New York Law Journal.*

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The Albany Law Journal has heretofore called attention to the law's scandalous delays in criminal procedure in this country, and

at the risk of becoming tedious we desire to revert once more to the matter which is one of great and vital importance. Nearly every State in the Union is able to furnish striking examples of this evil, which has brought the law and the courts into contempt, and furnished too often an excuse for lynch law. Under the system which permits judges of the higher courts to grant "certificates of reasonable doubt," most flagrant abuses have grown up. Years often elapse before the convicted criminal is brought to well-merited punishment, if, indeed, he does not succeed in escaping altogether the consequences of his crimes. It can hardly be denied that for these flagrant abuses the judiciary is directly responsible, and unless greater care and caution are exercised by judges the demand for the repeal or modification of existing laws will become so great as to be irresistable.—*Albany Law Journal.*

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It will doubtless surprise most people to know that imprisonment for debt, supposed to be long ago abolished, is still a common practice in England, says Case and Comment. Traffic in claims against miserable wretches is a regular business for which many companies are organized. They buy such claims relying on the security of the debtor's body. Untroubled by any "quality of mercy," they put the screws on the debtor and he pays. On a claim bought for a pittance they extort the full face value of the debt much swelled with costs. The business has become a scandal and has aroused an agitation for its extinguishment. The terms of the act under which this traffic in the bodies of Englishmen has grown up seem intended to apply only to those who can pay but will not, but in practice the act seems to be by no means thus limited. An effort to secure the repeal of the act has begun, and, as one writer to the Times says, "no more generous or just measure could be passed to commemorate the Victoria diamond jubilee reign."

In this country constitutional guaranties against imprisonment for debt are common, although they are not found in all the states. Still it may be said that such a practice as that which now humiliates Englishmen would be impossible in any state of the union. Our constitutional provisions on the subject present many questions for decisions, as shown in the note to Carr v. State (Ala.) 34 L. R. A. 634, but they are mostly in distinguishing between debts and other obligations. A body execution for a fine or penalty or on a judgment for tort is upheld because the obligation is not for a debt but for wrongdoing. Some peculiar cases are presented. In Carr v. State the constitution was held to be violated by a statute which provided that a banker receiving a deposit when insolvent should be fined not less than double the amount of the deposit, one half of which should go to the depositor, and that payment thereof before conviction should be a defense to the prosecution. This was evidently an attempt to use the machinery of a prosecution to collect

the claim, rather than to punish the offense. In civil actions for torts the constitutional protection is often claimed but usually without success.—*Chicago Legal Adviser.*

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The Supreme Court of New York will, it is reported, soon be called upon to decide the novel question as to whether or not angels have wings. It appears that a resident of Syracuse in that State commissioned a New York artist to furnish him with a memorial window in memory of his wife, at a cost of $500. The window was to have been placed in St. Mark's Church, Syracuse, but when ready for delivery the bereaved husband found that, among other things, it depicted a trio of angels, one of the trio being without wings; and deeming this inartistic, he declined to accept the window or to pay the contract price. The artist claims that her design for the window was submitted to and approved by the husband, and that his objection to the angel as being wingless comes too late. She has therefore instituted suit claiming the price due under the contract, an additional sum for placing the window in the church and substantial damages for the injury to her professional reputation by the defendant's refusal to accept the picture. Is the question one of fact for the jury, or of law for the court to determine? And should the case prove to be one calling for the production of expert testimony, from what quarters shall the experts be summoned? The question has long vexed the theological world, but so far as our information goes this is the first time an effort has been made to have it judicially determined.—*Washington Law Reporter.*

## *NOTES.*

The drunkenness of a trespasser who sits down on a railroad track is held, in Price v. Philadelphia, W. & B. R. R. Co., (Md.) 36 L. R. A. 213, not to excuse him from the effect of his negligence.

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A devise over in default of surviving heirs of the body of the first taker by him begotten is held, in Grainger v. Grainger, (Ind.) 36 L. R. A. 186, to be valid, since it is made on a definite failure of issue, and the rule in Shelley's case has no application.

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The fact that a person is blind is held, in Zachery v. Mobile & O. R. Co. (Miss.) 36 L. R. A. 546, insufficient to justify a carrier in refusing to accept him as a passenger.

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The right of a gas company to charge meter rent to small consumers of gas in addition to the maximum charge per thousand feet for gas, which is fixed by the charter of the company, is denied in Louisville Gas Co. v. Dulaney (Ky.) 36 L. R. A. 125.

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A merely parol dedication of a street is held in San Francisco v. Grote (Cal.) 36 L. R. A. 502, to be insufficient to support an action of ejectment by the city againt the owner of the fee.

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The relaying of a street railway after nonuser for about five years, when no action has been taken to forfeit the franchise, is held, in Milwaukee Elect. R. & L. Co. v. Milwaukee (Wis.) 36 L. R. A. 45, to be beyond the power of the city to prevent where the state has not granted to the city any power to forfeit the franchise.

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For the loss of the fingers of a little child who puts her hand up the spout of a coffee grinder in a store or shop, while there with

her father to make a purchase, it is held, in Holbrook v. Aldrich (Mass.) 36 L. R. A. 493, that the shopkeeper is not liable.

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A boy between fourteen and fifteen years of age who did not know that he was violating any law, although he knew the difference between right and wrong, was held, in State v. Yeargan (N. C.) 36 L. R. A. 196, to be not liable to punishment for a simple misdemeanor in betting money at a game of chance.

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Voluntary intoxication is held, in Harris v. United States (D. C. App.) 36 L. R. A. 465, to be neither an excuse nor a palliation for the crime of murder. In a note to this case the great number of authorities are compiled on the question, "What intoxication will excuse crime?"

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An ordinance regulating the number of hours in which laborers and mechanics shall be employed on the public works belonging to the city, and making its violation a misdemeanor, is held, in State v. McNally (La.) 36 L. R. A. 533, to be invalid, as the legislature only can create such an offense.

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A certificate of deposit reciting that it is "to be left six months," and adding, "No interest after maturity," is held, in Towle v. Starz (Minn.) 36 L. R. A. 463, to be a time, and not a demand, certificate, and that to hold an endorser payment must be demanded at the end of six months on the last day of grace.

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An aged woman riding in a funeral procession in a carriage driven by her daughter-in-law, when it was struck by a street car at a crossing, is held, in Johnson v. St. Paul City R. Co. (Minn.) 36 L. R. A. 586, to be not chargeable with negligence, although she did not look or listen for approaching cars, but relied entirely upon the driver.

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The assumption by the engineer of a train that a person on the track will get off before the train reaches him is held, in Gunn v. Ohio River R. Co. (W. Va.) 36 L. R. A. 575, to be improper when the person on the track is a child of tender years, or one who is plainly and obviously disabled by deafness, intoxication, sleep, or other cause.

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Statutory permission to serve process on a domestic corporation by publication if its officers or agents cannot be found in the state is

held, in Bernhardt v. Brown (N. C.) 36 L. R. A. 402, to be insufficient to authorize a sale of the property of the corporation on execution upon a judgment based on such service, except in case of an attachment of property.

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A claim of a homestead exemption in property conveyed to defraud creditors, when such conveyance has been set aside at the suit of a creditor and the land declared subject to his judgment, is upheld in Kennedy v. First Nat. Bank (Ala.) 36 L. R. A. 308. Several judges dissent, and very elaborate opinions review the authorities on the subject on both sides.

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A prisoner in a reformatory who violates his parol by going into another state is held, in Drinkall v. Spiegel (Conn.) 36 L. R. A. 486, to be a fugitive from justice within the provision of the United States Constitution for the surrender, on the demand of the Executive of another state, of the person fleeing from justice.

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The misdelivery of goods by an agent of a connecting line or a warehouseman is held, in Illinois Cent. R. Co. v. Carter (Ill.) 36 L. R. A. 527, insufficient to render the forwarding carrier liable, where it safely delivered the goods to the connecting line, for safe carriage to the destination.

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An evident and notorious abandonment of a public road, with the physical closing of it, known to the municipal authorities, on the faith of which private parties have expended money in improvements, is held, in Baldwin v. Trimble (Md.) 36 L. R. A. 489, to constitute an estoppel against the reassertion of the public easement.

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An ordinance limiting the speed of driving on streets to 6 miles an hour is held, in State v. Sheppard (Minn.) 36 L. R. A. 305, to be inapplicable to a salvage corps responding to an alarm of fire, and as to them it is held that the restriction is unreasonable and invalid. A note to the case shows the other decisions on the regulation of speed of vehicles in streets.

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The nonuser of a street-railway franthise for more than four years during a period of great industrial depression and financial difficulties, during which the street is paved with wooden blocks and the old rails and ties, which were substantially worthless, taken up but some of the poles and wires remain in place, is held, in Wright v. Milwaukee Elec. R. & L. Co. (Wis.) 36 L. R. A. 47, insufficient to show an abandonment or surrender of the franchise.

The fact that a train was running at high speed in violation of law and in breach of the promise of the engineer made to a boy who intended to jump off is held, in Howell v. Illinois Cent. R. Co. (Miss.) 36 L. R. A. 545, insufficient to render the railroad company liable for injury to the boy, when he attempted to get off knowing the danger.

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Placing fireworks in the parlor of a residence for use the next day in a Fourth of July celebration is held, in Heron v. Phœnix Mut. F. Ins. Co. (Pa.) 36 L. R. A. 517, to avoid the insurance on the building under a clause prohibiting fireworks to be "kept, used or allowed" on the premises, "any usage or custom of trade" to the contrary notwithstanding.

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The liability of a municipality for damage to premises by surface water resulting from changing the grade of the street is held, in Jordan v. Benwood (W. Va.) 36 L. R. A. 519, to be limited to cases in which the water is collected and cast upon the lot in a body or mass; and the mere fact that the surface water is interfered with or its flow increased by a change of grade is insufficient to make the city liable.

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The sickness and death of children, which are directly due to the failure of a natural-gas company to supply the needed gas for fuel to a dwelling house in winter, when it had assumed to furnish the supply and other fuel could not be procured, are held, in Coy v. Indianapolis Gas Co. (Ind.) 36 L. R. A. 535, to be elements of damages recoverable from the gas company.

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The power of a city council to order the destruction of all intoxicating liquors in the city, and pledge the faith of the city to pay for them in anticipation of riot, lawlessness and mob, as on the evacuation of Richmond, in April, 1865, is denied, in Wallace v. Richmond (Va.) 36 L. R. A. 554, overruling the prior decision in that state which had been followed by the Supreme Court of the United States in another case growing out of similar facts.

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The Supreme Court of New York recently held in the case of Cruger v. Phelps et. al., that a condition in the will that a daughter and beneficiary of testator should forfeit her right to the income of the residuary estate in case she resided or traveled outside of the continent of Europe, expressly limited to the liftime of her husband or until "she shall be divorced from him *a vinculo matrimonii* and remain so divorced from him," was void, as the same amounted to a

direct inducement to the daughter to procure a divorce. It was also held that the other provisions of the will would stand as if it had been written entirely, omitting all that part relating to such condition.

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The Supreme Court of Tennessee in Hill v. Hatch, 47 S. W. Rep. 349, has adopted the prevailing doctrine, that when an officer of the law, acting either under police rules or on his own responsibility, takes from a prisoner personal property in no way connected with the criminal charge, either for its safe keeping, or to remove from his control that which might be used in affecting his escape, such property is not liable to garnishment in the officer's hands, or in those of any one with whom he deposits them.—*Chicago Legal Adviser*.

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Negligence in pointing a gun at another and pulling the trigger, is held, in Bahel v. Manning (Mich.) 36 L. R. A. 523, to be unaffected by the fact that the person doing it had used the ordinary means of unloading the gun and satisfied himself that it was unloaded. But the fact that the person injured failed to protest or get out of the way when he saw that the gun was about to be snapped, and had time to do so, was held to constitute such contributory negligence as would preclude his recovery of damages from the other.

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The destruction of a substantial portion of leased premises without the lessee's fault is held, in Wattles v. South Omaha Ice & C. Co. (Neb.) 36 L. R. A. 424, to release the lessee from liability for rent pro tanto, unless he expressly assumed the risk of the destruction. This repudiates the common law rule, and approves an opinion of Judge Brewer in a Kansas case, "because it is a magnificent protest against slavish devotion to antiquated rules and .... because it breathes the spirit of humanity and equity, and is based on a thought of the nineteenth century."

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An illiterate maker induced by fraud to sign a note and mortgage, supposing he is signing other instruments, is held, in Green v. Wilkie (Iowa) 36 L. R. A. 434, not to be liable even when the note is in the hands of an innocent purchaser, unless he was guilty of negligence in making the note. This is on the ground that he was never a party to the contract contained in the instrument. With this case the authorities are collected showing the general rule, and the exceptions thereto, as to the effect of fraud in obtaining the execution of a note as against a bona fide holder.

Failure of the apparent maker to repudiate his forged signature to a note when it is first shown him, and even his statement that the note will be paid, are held, in Traders' Nat. Bank v. Rogers (Mass.) 36 L. R. A. 539, to be insufficient to render him liable unless the holder had been induced thereby to assume and act upon the assumption that the signature was genuine or was admitted to be so. The note to the case reviews the decisions on the liability of persons whose signatures are forged on commercial paper, including the questions of estoppel and ratification of such signatures.

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The Supreme Court of Pennsylvania has recently declared the just and equitable rule, that a decree for perpetual disbarment of an attorney for attacking the judicial integrity of the court in a manner tending to influence the court in a decision should not be made when the attorney has previously been of good character, and assidious in his practice, and is past middle life, and therefore is not likely to succeed in any other vocation; and imposed, in the case in hand, a disbarment for two years only, on condition of good behavior, as being sufficient punishment. In re Smith, 36 Atl. Rep. 134.

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According to a recent decision by Coxe, Dist. J., in the Circuit Court for the southern district of New York, in Hilson Co. v. Foster, 80 Fed. Rep. 896, "where the goods of a manufacturer have become popular not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the good-will thus created is entitled to protection. The money invested in advertising is as much a part of the business as if invested in buildings or machinery, and a rival in the business has no more right to use the one than the other, — no more right to use the machinery by which the goods are placed on the market than the machinery which originally created them."

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The Supreme Judicial Court of Massachusetts has held in the case of Kelley v. New York, N. H. & H. R. Co., 46 N. E. R., that an action will lie in favor of a husband for the loss of consortium, caused by injuries to his wife through the negligence of the defendant, though the wife has already recovered in her own right for the injuries received.

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In State v. McCoy, 49 Pac. 420, (June 9, 1897), the Supreme Court of Utah in passing on the question of the right to use photographs in criminal cases says:

"We are of the opinion that the photograph was properly introduced in evidence. The witness saw a young woman in defend-

ant's office at the time in question under the peculiar circumstances stated. He did not know her name, but noticed her so critically that he would know her again if he should see her. He was able to give a minute description of the woman he saw, but such description, however minute, could not carry to the minds of the jury so perfect a representation of the woman as an accurate photograph would present. The photograph, when shown to be a correct likeness of the deceased, served the purpose of locating her at defendant's office, and identifying her with more accuracy than any description from the witness could do, and thus aid the jury in coming to a more correct conclusion than they otherwise could. In the case of Dederichs v. Railroad Co., 46 Pac. 656, 14 Utah—, this court held that the law was well established that photographic scenes are admissable in evidence as appropriate aids to the court and jury in applying the evidence, whether it relates to persons, things or places, provided such photographs are shown to be correct. In the case of People v. Durrant (Cal.), 48 Pac. 83—a case where the question at issue was very similar to the one here presented—a photograph of the deceased, taken three years before the date of the testimony, was offered in evidence, and the court held the photograph admissible on the ground decided by this court in the above mentioned case.

# BOOK REVIEWS.

GENERAL DIGEST, AMERICAN AND ENGLISH—Annotated. Vol. III. New series. Ready for delivery by Lawyers' Co-Operative Publishing Co., Rochester, New York.

This volume contains a digest of cases reported from January 1, to July 1, 1897, in the Courts of the United States, Canada and the Higher Courts of England.

To the usual brief statement of the rulings of the court in the case digested, there are added in many cases notes containing cases cited by the court, and distinguished, criticised, limited or overruled; also notes containing compilations made by the Editor of authorities on the point or points raised by the decision in the case digested.

These notes are of great value, and materially assist the over worked lawyer to find authorities upon questions under investigation; and the series will become more valuable as successive volumes are issued, and in time will form an encyclopaedia of the law based upon current cases.

HANDBOOK ON THE LAW OF EQUITY PLEADING—BY BENJAMIN J. SHIPMAN, author of "Common Law Pleading." Hornbook series. West Publishing Company: St. Paul. Price $3.75, net, delivered.

A careful examination of this work proves it to be equal in merit to that of any of the previous volumes of the Hornbook series, about which so much of a commendatory nature has been written.

Equity Pleading like that of Common-Law Pleading is necessarily complicated and it is pleasing to find the subject treated according to the admirable arrangement of the Hornbook series. An accurate view of the principles, a defect so prominent in other treatises upon the same subject, is amply supplied by this book, and it is a pleasure to turn from the older works on Equity Pleading where one must plod through pages of dry details in order to get a clear understanding of the principles to such a work as that under consideration, where the established rules or principles are fully set forth and copiously illustrated in such a manner as to fully remove this objectionable feature.

The work treats of the origin, nature, and object of Equity Pleading, giving a brief sketch of the development of the system,

and showing the analogy between Equity and Common Law Pleading.

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Michigan lawyers will find this a good reference book, as the author has quoted abundantly the decisions of their state.

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A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITORS BILLS—BY FREDERICK S. WAIT of the New York Bar. Published by Baker, Voorhis & Company, New York. Price $6.00 net, or $6.30 delivered.

This is the third and enlarged edition of a well-known work on an important subject. In this new third edition the amount of matter written and the number of citations increased to such an extent that the second edition published in 1889 is made to appear somewhat antiquated. The citations have been increased several thousand over the number contained in the previous edition, and the latest important decisions bearing upon the topics discussed have been utilized, and it will please Michigan lawyers to find that cases reported in the last volume (105) of the Michigan Reports have been cited, and in several instances the latest decisions of this state have been analyzed, distinguished and criticised.

The work, published in one large octave of 900 pages, is complete, thoroughly up to date and satisfactory in every respect.

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A HAND-BOOK ON THE ANNEXATION OF HAWAII—BY LORRIN A. THURSTON.

This little work gives a brief description of Hawaii, its People, Government, Laws, Commerce, Finance, Educational System and Resources, and contains a Digest of the Official Opinions of American Presidents, Secretaries of State, Ministers and Military and Naval Officers concerning the Annexation or Control of Hawaii. The author favors the annexation of the Island and answers various objections thereto.

# DIGEST OF RECENT DECISIONS.

ABATEMENT AND REVIVAL.

An action against a director of a corporation for losses arising from his negligent conduct, does not abate on his death. *Obrien* v. *Blaut*, 17 App. Div. 285; 45 N. Y. Supp. (79 St. Rep.) 217

ADVERSE POSSESSION.

Possession which originated under a permission of the owner to occupy with an option to purchase, and which has never been surrendered, is not adverse. *Harrison* v. *Caswell*, 17 App. Div. 252; 45 N. Y. Supp. (79 St. Rep.) 560.

Merely taking possession of land and fencing it, because it is "open and abandoned" is insufficient to constitute an adverse possession. *De St. Laurent* v. *Geischeidt*, 18 App. Div. 121; 45 N. Y. Supp. (79 St. Rep.) 730.

One in adverse possession for ten years has a good title against all claimants not under disability. *Cave* v. *Anderson*, (S. C.) 27 S. E. 693.

APPEAL AND ERROR.

After the decree has been modified and the case remanded, with directions, held error for trial court to open the case for a new trial. *Bloxham* v. *Florida Central & P. R. R. Co.*, (Fla.) 22 So. 697.

On appeal from an order distributing proceeds of sale, the decree authorizing the sale is not open to review. *Green* v. *Western Nat. Bank*, (Md.) 38 Atl. 131.

Where the verdict of the jury could not well have been otherwise, the judgment will not be reversed because of improper remarks by the trial judge tending to intimidate the jury. *Hoey* v. *Fletcher*, (Fla.) 22 So. 716.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Though a schedule was filed two days after the assignment, the assignment was valid as against attachment levied after the filing of the schedule. *Goodin* v. *Newcomb* (Kan. App.) 49 Pac. 821.

As against an assignor, the assignment takes effect from the time he delivers it to his attorney for recording. *In re Wright* v. *Schmid's Estate*, (Pa.) 38 Atl. 151.

An insolvent corporation may make a general assignment for creditors without preferences. *Croll* v. *Empire State Knitting Co.*, 17 App. Div. 282; 45 N. Y. Supp. (79 St. Rep.) 680.

The validity of a general assignment cannot be summarily disposed of on a motion. *Bates* v. *Harding*, 17 App. Div. 606; 45 N. Y. Supp. (79 St. Rep.) 396.

ATTACHMENT.

On motion to vacate an attachment the merits of the action will not be determined on affidavits. *Furbish* v. *Nye*, 17 App. Div. 325; 45 N. Y. Supp. (79 St. Rep.) 214.

BANKS AND BANKING.

An order by a depositor in a savings bank, directing transfer of deposit, not delivered to the bank or brought to its knowledge before the death of depositor, held revoked thereby. *McNamara* v. *McDonald*, (Conn.) 38 Atl. 54.

Where bonds are forwarded by a bank to its correspondent to collect the principal and interest for the bondholders and on their account, the correspondent is the agent of the bondholders and liable to them for neglect to collect the interest. *Kelly* v. *Phenix Nat. Bank*, (N. Y.) 17 App. Div. 496.

The instruction "papers to be delivered only on payment of draft," sent a bank with a draft and sealed package, was not violated by allowing the drawee to open the package and examine the papers before paying the draft. *People's Nat. Bank* v. *Freeman's Nat. Bank*, (Mass.) 47 N. E. 588.

BENEFICIAL ASSOCIATIONS.

A member whose policy has been rejected must pursue the course provided by the by-laws, before suing thereon. *Levy* v. *Order of Iron Hall*, (N. H.) 38 Atl. 18.

BILLS AND NOTES.

An indorser before delivery of an accommodation note, held, liable to an innocent purchaser as the maker. *McFetrick* v. *Woodrow*, (N. H.) 38 Atl. 18.

Mutual promises held no consideration for a note where no payments are made by either party. *In re Smith's Estate*, (Vt.) 38 Atl. 66.

A note falling due in the hands of the payee ceases to be negotiable. *Salisbury* v. *Stewart*, (Utah) 49 Pac. 777.

Stipulation in a note including covenants of a mortgage to pay taxes, insurance and waste, renders the note non-negotiable. *Donaldson* v. *Grant*, (Utah) 49 Pac. 779.

One who accepted as security a note showing on its face that it was held by the payee in a public capacity, held not a bona fide purchaser. *Freeman* v. *Bailey*, (S. C.) 21 S. E. 686.

A promise by the drawer after protest, to pay a sight draft is prima facie evidence of presentment, demand and notice to the drawee. *Smith* v. *Unangst*, 20 Misc. 564; 46 N. Y. Supp. (80 St. Rep.) 340.

Maker of note which was immediately transferred by indorsement to a National bank by the payee, with maker's consent, held to have no defense thereto in hands of a receiver of such bank. *Hettinger* v. *Meyers*, (C. C. A.) 81 Fed. 805.

One who purchased a note without knowledge that it was given merely as collateral held, entitled to recover the full amount, if he took without notice. *Montgomery* v. *Hunt*, (Ga.) 27 S. E. 701.

A promissory note payable on a certain time after date, with interest at the rate of 9 per cent. until paid, carries interest at that rate after the maturity of the note as well as before. *Augusta Nat. Bank* v. *Hewins*, (Me.) 38 Atl. Rep 156.

CARRIERS.

A street car conductor need not assist a vigorous young passenger to step down from the side board of the car. *Conway* v. *Lewiston & A. Horse R. Co.*, (Me.) 38 Atl. 110.

A street railroad company which has accepted a ticket or fare from a passenger riding on a front platform when the car is full, cannot eject him without returning his ticket or fare. *Hanna* v. *Nassau Electric R. R. Co.*, 18 App. Div. 137; 45 N. Y. Supp. (79 St. Rep.) 437.

A stipulation in a shipping receipt that the company will not be held responsible for breakage does not relieve it from liability for its negligence. *Morris* v. *Weir*, 20 Misc. 586; 46 N. Y. Supp. (80 St. Rep.) 413.

CHATTEL MORTGAGES.

Failure to refile a chattel mortgage, may be availed of as a defense by a receiver of the corporation mortgagor, appointed in proceedings for its voluntary dissolution. *Farmers L. & T. Co.* v. *Baker*, (N. Y.) 20 Misc. 387.

CONSTITUTIONAL LAW.

If one, fully cognizant of his constitutional right to remain silent in respect to matters tending to incriminate himself, abandons it, whether under compulsions or otherwise, and essays to speak under oath, he must speak the truth, and may be prosecuted for perjury if he does not; but, before this principle can be invoked, it must appear that the witness' abandonment of his rights was knowingly and understandingly made, and that no undue

advantage has been taken of an ignorant witness in the course of an inquisitorial examination. *United States* v. *Bell*, U. S. C. C., W. D. (Tenn.) 81 Fed. Rep. 880.

CORPORATIONS.

Liability of stockholders for corporate debts, cannot be enforced until judgment against corporation and an execution returned, or until it has suspended business for a year. *Merrill* v. *Meade*, (Kan. App.) 49 Pac. 787.

Directors may vote as stockholders for an increase of capital. *Jones* v. *Concord & M. R. R. Co.*, (N. H.) 38 Atl. 120.

Where an officer is acting partly for himself and partly for the corporation, notes to him will not effect the company. *Victor Gold & Silver Mining Co.* v. *Nat. Bank of the Republic*, (Utah) 49 Pac. 826.

Personal judgment by default may be rendered against a foreign corporation, though the return of service does not show that it was doing business in the State when service was made. *Farrell* v. *Oregon Gold Mining Co.*, (Oreg.) 49 Pac. 876.

CRIMINAL LAW.

Minutes of the grand jury are not common law evidence as to what a witness testified to before them. *People* v. *Conroy*, (N. Y.) 153 N.Y. 174; 47 N.E. 258.

Where a defendant in a criminal action offers himself as a witness, he is subject to searching cross-examination and may be asked as to specific immoral acts. *Same case.*

A photograph, if its correctness be proven, may be used to illustrate the evidence in the case. *State* v. *Hersom*, (Me.) 38 Atl. 160.

Defendant is entitled to have the elements of the offense stated to the jury in connection with the charge as to reasonable doubt. *Nelson* v. *Territory*, (Okla.) 49 Pac. 920.

Where during the trial a juryman was entertained at dinner by the prosecuting attorney, the verdict will be set aside. *Rainey* v. *State*, (Ga.) 27 S. E. 709.

Where a defendant in a criminal case testifies as a witness therein on his own behalf, and his testimony conflicts with that of a witness for the prosecution, it is not improper for the prosecuting attorney in his closing argument to the jury to remark that: "The State's witness is entirely disinterested, but that is not the case with the defendant. He stands here charged with crime, and it is his interest to screen himself." *Maloy* v. *State*, (Fla.) 22 So. Rep. 217.

DAMAGES.

Exemplary damages, in an action for injuries causing death, may be given, where defendant exhibited such entire want of care as showed a conscious indifference to consequences. *Cerrillos Coal R. Co.* v. *Deserant*, (N. M.) 49 Pac. 807.

Injury to credit is too remote to be assessed in favor of one whose property is levied upon as the property of another. *Cunningham* v. *Sugar*, (N. M.) 49 Pac. 910.

DEEDS.

A water right which is essential and incidental to the reasonable and intended use of the property, will pass as an appurtenance without words of specific and express direction. *Dexter Sulphite & Paper Co.* v. *Frontenac Paper Co.*, 20 Misc. 442; 46 N. Y. Supp. (80 St. Rep.) 362.

A deed may be reformed after the lapse of six years, if the action is brought as soon as the mistake is discovered. *Penfield* v. *Village of New Rochelle*, 18 App. Div. 83; 45 N. Y. Supp. (79 St. Rep.) 460.

DIVORCE.

Where the evidence is conflicting on an application for temporary alimony, the discretion of the trial court will not be disturbed. *Heaton* v. *Heaton*, (Ga.) 27 S. E. 677.

EASEMENTS.

One entitled to way over land, held not entitled to exclusive use of it. *Morton* v. *Thompson*, (Vt.) 38 Atl. 77.

EVIDENCE.

A surgeon held competent to testify to his opinions of the size of the bullet that made the wound in question. *People* v. *Wong Chuey*, (Cal.) 49 Pac. 833.

The fact that a train was due at a certain station at a certain time, is some evidence that it was actually there at that time. *Same case.*

A subscribing witness may testify to the apparent mental condition of testatrix at the time of execution of the will, *Matter of Potter*, 17 App. Div. 267; 45 N. Y. Supp. (79 St. Rep.) 563.

EXECUTION.

That defendant in execution was not allowed to point out property sufficient to pay the debt, held not a good ground of illegality. *Douglas* v. *Singer Manf'g Co.* (Ga.) 27 S. E. 664.

A right to occupy stalls in a city market sold by the city under the statute, is subject to lien. *Green* v. *Western Nat. Bank*, (Md.) 38 Atl. 131.

Where a creditor whose debt was secured by mortgage of land, obtained judgment, reconveyed the land and acquiesced in the sale under execution in favor of another creditor, and claimed the proceeds, the purchaser at sheriff's sale acquired an unincumbered title. *Marshall* v. *Hodgkins*, (Ga.) 27 S. E. 748.

EXEMPTIONS.

There can be no exemption for one person in another's property *Hinson* v. *Booth*, (Fla.) 22 So. 687.

EXECUTORS AND ADMINISTRATORS.

An executor is not liable on his bond for lands in another state sold under power conferred by the will, it never having been probated in such other state. *Emmons* v. *Gordon*, (Mo.) 41 S. W. 998.

A nephew who made a trip after his uncle's death to consult with the executrix regarding the management of the estate held entitled to recover his expenses from the estate. *Muldrick* v. *Galbraith*, (Oreg.) 49 Pac. 886.

A mortgage creditor of deceased, who proved his claim against the estate for the entire amount, averring that he held no security, waived his security. *Nickerson* v. *Chase*, (Me.) 38 Atl. 175.

FRAUDULENT CONVEYANCES.

General creditors who would benefit by having a judgment against the assignor defeated, may attack it as having been paid or as fraudulent. *In re Wright* v. *Schmid's Estate*, (Pa.) 38 Atl. 151.

Sums paid out by the grantee to protect his alleged interest in the property conveyed, will not be restored to him on setting aside the transfer. *Sabin* v. *Andrews*, (Oreg.) 49 Pac. 870.

GARNISHMENT.

A Trustee cannot reduce his liability by pleading payments made for his creditor under contracts within the Statute of Frauds. *Garfield* v. *Rutland Ins. Co.*, (Vt.) 38 Atl. 235.

HABEAS CORPUS.

The question of the guilt of a person convicted of a public offense cannot be raised on application for habeas corpus. *Ex Parte Crawford*, (Nev.) 49 Pac. 1038.

HOMESTEAD.

A Grantee in a deed of a homestead, who assumes payment of a mortgage thereon, is estopped to deny the validity of the mortgage. *Brown* v. *Elwell*, (Wash.) 49 Pac., 1068: A mortgage on a homestead held to create a lien thereon, though it did not mention the homestead in terms. *Brown* v. *Elwell* (Wash.) supra.

INJUNCTION.

An action against sureties on an Injunction Bond will be continued until the amount of damages has been determined in the Injunction Suit. *Carpenter* v. *Fisher*, (N. H.) 38 Atl. 211.

INSOLVENCY.

A payment by an insolvent on a secured debt may be an unlawful preference if the security is inadequate, but it cannot be such if the payment is made out of the proceeds of the security itself. *Duluth Trust Co.* v. *Clark*, (Minn) 72 N. W., 127: Secured bondholders of an insolvent, who were not notified by mail, of the time limited for admission of claims, held entitled to be admitted as creditors after the expiration of such time. *Pattberg* v. *Lewis Pattberg & Bros*, (N. J. Ch.) 38 Atl., 205: On their admission, such creditors will be entitled to a preferential dividend, to put them on equality with the other creditors, who have already received dividends. *Pattberg* v. *Lewis Pattberg & Bros.*, supra.

INSURANCE.

A statement by the agent that the Company refuses to pay the loss, held to amount to a waiver of proof of loss. *Phenix Ins. Co.* v. *Searles*, (Ga.) 27 S. E. 779: The company, by availing itself of its rights under the policy to obtain additional information, etc., held not to have waived a forfeiture resulting from failure to furnish proofs of loss within the time prescribed. *Phenix Ins. Co.* v. *Searles*, supra: The condition as to the title held not to avoid the policy, where the agent knows that the insured does not own the property. *Phenix Ins. Co.* v. *Searles*, supra: Where proofs of loss are not furnished within the time prescribed, the company's subsequent refusal to pay the loss was not a waiver of proofs. *Phenix Ins. Co.* v. *Searles*, supra: One induced by mistake to pay premiums on a policy void at its inception may recover them back on repudiating the policy, though the insurer was estopped from denying the validity of the policy. *Hogben* v. *Metropolitan Life Ins. Co.*, (Conn.) 38 Atl., 214: Where an applicant for insurance refuses to accept the policy, and pays no premium, there is no completed contract of insurance. *Hogben* v. *Metropolitan Life Ins. Co.*, supra.

The phrase "voluntary exposure to unnecessary danger," in an accident policy, does not embrace every exposure of the assured that might have been avoided by the exercise of due care on his part. It relates to dangers of a substantial character, of which the assured at the time had knowledge, and to which he purposely and consciouly exposed himself, intending at the time to assume all the risks. *U. S. Mutual Accident Association* v. *Hubbell*, (Ohio) 47 N. E. Rep. 544.

INTOXICATING LIQUORS.

A medicinal preparation, capable of being used as an intoxicating beverage, held within the act prohibiting the sale of intoxicating liquors. *Chapman* v. *State*, (Ga.) 27 S. E., 789.

JUDGMENT.

Plaintiff cannot recover an amount larger than is claimed in his declaration, though the evidence shows that a larger amount is due him. *Hunnicut* v. *Perot*, (Ga.) 27 S. E. 787.

MASTER AND SERVANT.

A contract between a corporation and a workman who has received injuries while in its service, that he shall be paid a given rate of wages per month, and shall render such services as he can, without any stipulation as to duration, is not an undertaking to pay such workman an annuity during the remainder of his life, but a contract of employment by the month, which may be terminated by either party at the end of any month. *Tennessee Coal, Iron & Railroad Co.* v. *Pierce*, U. S. C. C. of App., Fifth Circuit, 81 Fed. Rep. 814.

MORTGAGES.

A mortgagee, where there has been no default, cannot sell the mortgaged lands, so as to pass a good title to a bona fide purchaser. *Rogers* v. *Barnes*, (Mass.) 47 N. E., 602.

MUNICIPAL CORPORATIONS.

Where a bid for public work was accepted, held that the public officers could not afterwards reject it, without giving the bidder a hearing. *Stanley* v. *Board of Chosen Freeholders of Passaic County*, (N. J. Sup.) 38 Atl., 181.

PARENT AND CHILD.

The criterion of the parents' right of action for a wrongful enticing and persuading their minor child from their custody is not the will of the child, but the will of its parents; and it is immaterial that at the time of the wrongful act the child was not actually a member of the parents' household, provided they had a right to recall her to their custody and service. *Hare* v. *Dean*, (Me.) 38 Atl., 227.

PARTNERSHIP.

One who owns a share in the assets of a firm, and has a one-third interest in the profits of the continued conduct of the business, but who is excluded from any control in such business, is not in partnership with such firm, as between the parties. *Wormser* v. *Lindauer*, (N. Mex.) 49 Pac. Rep. 896.

PRINCIPAL AND AGENF.

Persons dealing with a general agent are not bound by private limitations upon his authority of which they have no notice. *Louisville & N. R. Co.* v. *Tift*, (Ga.) 27 S. E. 765.

Sub-agents employed by a general agent may bind the principal. *Same case.*

RAILROADS.

If stock entered the right of way at a place where the company was not bound to fence, there can be no recovery, without proof of negligence. *Eaton* v. *McNeill*, (Oreg.) 49 Pac. 875.

A railroad company held liable where steam suddenly escaped from an engine standing near a crossing, and as a result plaintiffs intestate, who was driving by was killed, because of a runaway. *Boothby* v. *Boston & M. R. R. Co.*, (Me.) 38 Atl. 155.

SALES.

Where goods were sold for future delivery, held, the question whether the title passed, was for the jury. *Dudley* v. *Poland Paper Co.*, (Me.) 38 Atl. 157.

A delay of 20 days after discovery of fraud, held not to warrant an inference of an affirmance of the contract. *Crossen* v. *Murphey*, (Oreg.) 49 Pac. 856.

TAXATION.

Taxes against railroad property cannot be collected from the former receivers of such railroad, unless they have assets of the railroad in their hands, or have diverted its revenues. *Comer* v. *Polk County*, (C. C. A.) 81 Fed. 921.

WILLS.

The bequest of a mortgage includes the bond it has given to secure. *Klock* v. *Stevens*, 20 Misc. 383; 45 N. Y. Supp. (79 St. Rep.) 603.

WITNESSES.

A witness impeached by disproving the facts testified to cannot de sustained by proof of general good character. *Bell* v. *State*, (Ga.) S. E. 669.

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## *ASEXUALIZATION OF CRIMINALS AND DEGENERATES.*

During the last session of the Michigan legislature, a bill was introduced which provided for the asexualization of persons, intimates of certain state institutions, persons convicted of certain crimes, and persons convicted for the third time of the commission of certain crimes, by emasculation, in order that such persons should cease to be reproductive of their kind. The bill provided,

"SECTION 1. *The People of the State of Michigan enact*, "That all persons, male or female, who are now or who may hereafter become inmates of the Michigan Home for the Feeble Minded and Epileptic, shall be subjected to an examination, by a board of medical examiners to consist of three competent physicians, to be selected as hereinafter provided, with a view to determining the advisability of causing such persons to submit to an operation that causes asexualization. After the examination above provided for, all such persons as are recommended by said board to be operated upon so as to cause asexualization shall, prior to the time at which such person or persons, whether male or female, are discharged from said Home for the Feeble Minded and Epileptic, be compelled to submit to an operation that causes asexualization, in order that such person or persons shall cease to reproduce their kind.

SEC. 2 It shall be the duty of the prosecuting attorney conducting the prosecution of any person within this State, charged with the commission of a felony to, upon the conviction of such person and before sentence shall be passed upon such person so convicted, in cases in which he believes that the person tried and convicted has been twice before convicted of the commission of a felony, produce before such court proper evidences of the fact that such person has been twice before convicted and sentenced for crimes amounting to a felony. Such evidences shall be made a matter of record in such court, and if they are, by the court, deemed sufficient to establish the fact that such person so convicted was twice theretofore convicted of a felony and sentenced, whether within or without this State, it shall be the duty of such court, upon recommendation of the jury, to include within and

make a part of the sentence passed upon such person so convicted, in addition to the sentence to which he has, by the crime which he committed and of which he was last convicted, subjected himself, the additional penalty that such person shall, within one year after the date of such sentence, submit to an operation which shall cause asexualization and renders such person unable to further reproduce his kind.

SEC. 3. If any person shall maliciously, forcibly or fraudulently lead, take, decoy, entice or carry away, or shall forcibly sieze, inveigle, or kidnap any female within this State, and shall carnally know her against her will, it shall be the duty of the judge before whom any person is convicted of such crime, upon recommendation of the jury, to include within and make a part of the sentence imposed upon such person so convicted, in addition to the penalties provided by the laws of this State, to be imposed upon persons convicted of such crime, a provision that within one year from the date of such sentence such persons convicted as aforesaid shall submit to an operation which causes asexualization, in order to prevent a possibility of a recurrence of the crime of which he was convicted and to stop his ability to reproduce his kind.

SEC. 4. In every case of a person confined in the Home for the Feeble Minded and Epileptic, before the operation shall be performed, it shall be the duty of the medical superintendent of such institution to report such case to the board of control of such institution. It shall thereupon be the duty of said board of control to summon three competent, practicing physicians of this State, who shall proceed to thoroughly examine such person. If, upon such examination, it shall appear to the board of physicians conducting such examination that such operation would be a benefit to the person undergoing such examination mentally, morally or physically, or that it is necessary as a restrictive measure to prevent propagation of kind in case such person is discharged from such institution, it shall be their duty to so report to the board of control of such institution, whose duty it shall thereupon be to cause such an operation to be performed on such person or persons as will cause asexualization and render them unable to reproduce their kind.

SEC. 5. Whenever, as a part of the sentence passed upon any person (male or female), confined in any of the penal institutions of this State, such person shall be liable to have an operation performed upon him or her which will produce asexualization, it shall be the duty of the warden of such institution to report the same to the board of control whose duty it shall be, in cases in which the attending physician of such institution finds that, on account of the delicate health of the prisoner, such operation may prove fatal and cause death, to appoint an examining board to consist of three competent, practicing physicians, who shall examine such person or persons, the sole object of such examination to be for the purpose of determining whether or not the condition of that person is such that subjecting such person to an operation which would cause asexualization would prove fatal to such person and cause death. Such board of examining physicians shall report the result of such examination to the said board of control, and, unless from such report, it shall appear that to subject such person to the operation aforesaid would be fatal and cause death, said board of control shall cause such operation to be performed within the time limited in the sentence passed upon such person.

SEC. 6. When any person confined in any of the State institutions of this State shall become liable, as above provided, to an operation that will produce asexualization, it shall be the duty of the board of control of such institution to authorize and require the medical superintendent, or the warden having charge of such institution, as the case may be, to perform or cause to be performed, such an operation upon such person or persons as will produce asexualization. The board of control shall have authority to employ not to exceed two competent, practicing physicians and surgeons of this State, to perform or aid in performing such operation; and such board of control shall have power to pay such physicians or surgeons from the moneys appropriated to such institution, a sum of not exceeding fifteen dollars and expenses for each of such physicians and surgeons for each operation.

SEC. 7. The penalty for non-compliance with the provisions of this act shall be just cause for forfeiture of, and removal from, the office or position of such superintendent, warden, member of the board of control, or other person named in this act.

This question has been thought by many to be too delicate to discuss in public, and at first I took this view, but upon investiga-

tion I found that so many members of both the legal and medical professions favored it, and spoke so strongly in favor of having such legislation in this state, that it would be foolish to desist on that ground. It seems that if any good will accrue to society and the state, surely we can well afford to overlook such a trifling objection.

Below will be found a statement giving a history of the bill from Dr. W. R. Edgar, who introduced it, together with several highly interesting articles from a number of Detroit's leading physicians, also an article from Mr. Clarence A. Lightner, lecturer on medical jurisprudence in the Detroit College of Law.—*Ed.*

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W. R. EDGAR, M. D.

The history of what was known as the "Asexualization Bill" introduced at the last session of the Michigan legislature briefly stated is as follows:

In 1895 my attention was called to this subject, while a member of the House, and I began to gather statistics. I found in this state an institution known as the Michigan Home for Feeble Minded and Epileptic, with 210 inmates, and that application had been made by over 600 others for admission. That there were in the state 3218 of this class alone, many of whom must of necessity be taken care of by the state within a few years. Also when they are once admitted they must ever remain a charge to the state, as under our present system few are ever cured or discharged.

This form of treatment has been recognized as a rational treatment for the many forms of epilepsy, while for the weak and feeble minded it has not been tried so often. But when we learn that many of this class became so long about the age of puberty, and that almost every one of them is addicted to that pernicious habit "Onanism", and as in the same degree to which this habit was practiced their condition existed. We hold then, any plan or mode of treatment that will remove the cause should be tried.

Our attention had been given solely to this class, when, however, our attention was called to that class known as confirmed criminals, and we also included them in the measure.

Calling to our aid the best legal minds we were able to interest in the subject the bill was prepared, introduced and ordered printed. We then sent a copy to almost every Asylum and Prison Superintendent in the United States and Canada, also to some 300 physicians, asking their opinion on such legislation. We received 198 replies, all favoring it with the exception of eight.

We also received many valuable suggestions in the way of amendments, some of which we incorporated in a substitute measure, which was adopted by the co mittee, who finally reported the bill out and recommended that it do pass.

We found, out of the 100 members in the House, 63 would vote for it. And in the Senate it would carry easily providing it passed the lower body.

On the day it came up for final vote there was a very exciting time in the Senate, and many of the members, friends of the bill, were absent, and did not get in to vote upon it. As it was, there were 45 who voted for it. A few seeing it had not the necessary 51 votes to pass, changed their votes to No. Many may wonder why we did not try again. With this as with many advanced movements in the past, politics stepped in. The cry was raised by the sentimentalist "They dare not pass such legislation." What a slogan it would be in future campaigns to say, "see what this or that party will do when they have the power; if you do not come up to a certain standard of intelligence we will cause you to be unsexed." So fast did this cry gain opposition, that we became disgusted and dropped the subject.

The interest that was aroused is still working, so much so that we are positive, some states will adopt this rational form of treatment within a few years, applying it to the criminal classes as well as those who are defective. To the criminal it would act as a deterrent, as no other one thing would do.

With the epileptic class, in each case where there would be a possibility of beneficial results, it would be tried, without working with the parents to gain their permission, as is the case now.

With the feeble minded, they would be so treated, thus stopping the drain upon their system, due to the habit named. This accomplished they would build up physically, and then their mental faculties could be developed. With the criminal class they would get out of our state, and those out would stay away.

Again all who have observed how such treatment works on the lower animals, changing the most vicious into docile and useful animals, changing their very nature. Believing crime becomes a disease, due to unknown and known causes, superintendents of prisons will inform you that each time a large delegation of women pass through their institution, for a few days following more infractions of rules and discipline occur than usual, showing that the habit "onanism" is practiced and is the cause of this viciousness.

Has it ever been tried? yes, not only in this country but in Europe. We find in the 7th biennial report of the Asylum for Idiotic and Imbicilic Youth, Winfield, Kansas, the following:

"The most aggravating and difficult condition which has confronted the management of the institution, was the number who were confirmed masturbators. Having exhausted all "moral suasion" and every known device to prevent or cure this horrible practice, I called in consultation three of the most eminent physicians in this part of the state, and after a careful examination and study of each case, it was decided a surgical operation was the only means whereby a cure could be affected. One of the most debased of that habit was selected, and an operation performed, under anaesthesia and antiseptic precautions. The boy did not suffer any pain, but as a matter of precaution was kept in bed seven days, and during that time did not miss a meal. A marked improvement both mentally and physically was the result. After three weeks he was sent home, and I learned through a letter from his father he was making a full hand on the farm. After one month three more were operated on, and one month later seven more, making eleven in all, with a marked improvement both mentally and physically. The nine are so improved that they have been transferred from the custodial to kindergarten class. The report further states: "I believe every parent who has children here and having their interest at heart, would, after examining into the condition of those boys operated on and observing the improvement in their condition, request the same treatment extended to their boys."

In Russia a religious sect have followed this as a religious belief since 1857, they are known as the skoptzy's or "whitedoves". All who have read the writings of Count Tolstoi have observed he strongly advocates this plan, holding, that man is degenerating and should cease propogating his kind. With this theory we cannot agree. But we do believe that with all the defective class it should be adopted.

When we look about us and see the asylums for insane, deaf and dumb, epileptic and feeble minded, etc., and learn that of the latter class alone there are over 90,000 in the United States, and only careing for 6000 in institutions where they are safe from society, thus allowing 84,000 to roam and contract marriage with their kind, we can readily form a picture of the condition of society a few generations hence.

We are firm in the conviction that this method is in the line

of bettering humanity, believing the light of the future will prove this statement true.

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WM. M. DONALD, M. D.

That this subject is commencing to assert itself as of grave importance is manifest. The session of 1897 in the legislature of Michigan saw the introduction of a bill having this object in view.

Some few years ago a similar bill was introduced into the legislature of Indiana; and about the same time the State of Connecticut enacted in purpose that "it is a serious criminal offence for certain classes of incompetents to cohabit or intermarry." Even remote Texas has fallen into line and has made an effort to pass a similar bill. This law of Connecticut (would be law of Texas) was of course simply in the nature of a compromise, and it is cited here to show the trend of public opinion.

That the bills introduced in the legislatures of Michigan and Indiana both failed of passage is evidence only of the fact that our legislators have not been educated up to the point of appreciating properly the value sociologically and economically of such a remedial measure. As a further buttressing of the statement that this subject is commencing to assume serious proportions, we may add, that several strong articles have appeared during the past year in some of the European journals upon this matter; and that though the press of America has been strangely silent in the discussion of the subject, yet an occasional out-cropping of pithy remarks and references is seen in the medical press of this country as well.

It is not within the province of this paper to discuss the arguments of Lombrosi, Nordau, and their followers. Suffice it to say, that to one who has followed their work, it seems well substantiated that a class exists which they denominate *Degenerates* and which include the various sub-classes of criminals, incompetents (or idiots) and epileptics of a severe type. The stigmata of degeneration—deformities, unequal development of the face or cranium, imperfection in development of the internal ear or the palate, hare-lip, irregular teeth, etc., etc., can be detected by any trained eye, and are found according to the above observers in the sub classes mentioned. Now, if this class of degenerates can be isolated, and wound up as it were, does it not seem the part of wisdom towards the community, of justice towards these unfortunates, and of mercy towards their

probable future progeny to place them in such a condition as will without undue harshness or severity prevent them from breeding their own degenerate spawn, and perpetuating their vicious or irresponsible personalities? For if there be one scientific principle that has engrafted itself upon the popular mind it is the principle of heredity. Proverbs have grown around it, which is the best evidence of its hold upon the people—"Like father, like son,"—What is bred in the bone will come out in the flesh."

Since then this principle is accepted by the masses and has the seal of approval of science; it is unnecessary to discuss it farther than to say that under ordinary conditions every class or every individual well bred is "true to type," or to express it in another way, well developed progeny in all respects is similar to itself.

Now when we consider that the sexual appetites are developed to access in many, if not in all of these degenerates, both in the male and in the female; that there are creatures of impulse and passion living only to gratify them at the expense of all reason and prudence; that no effort will be made to limit their offspring consistently with their incomes or degraded condition in life, do we not have the best of arguments in favor of the operation suggested by the title of this article? Laws may be passed *ad libitum* by all the legislatures of all the states prohibiting the marriage relation within certain defined limits; but love laughs at locksmiths equally in the degenerate as in the normal type, and passion will be gratified no matter what the penalty.

This being so there is but one of two courses open—either to segregate these classes, keep the sexes seperate or to practice castration.

The first alternative presents the grave objection of the necessity of close confinement under state supervision with its attendant expense.

The second has much to commend it in its comparative safety to the individual, its certainty in securing the desired end, and its minimum of expense.

It is not to be inferred from the foregoing that I would urge this operation for every person exhibiting (in greater or less degree) physical evidences of degeneracy, inasmuch as that sweeping method would involve a large number of persons having the same rights as the perfectly normal man. But when any individual has shown by indubitable signs that he or she belongs to either of the classes denominated habitual criminals, feeble-minded, or epileptic, then

the operation should be performed at once, and the possibility of the further perpetuation of this type prevented.

Consider, moreover, the deterrent influence the fear of castration would have upon the mind of the average criminal who is not an absolute moral wreck. Upon the more advanced types of criminal degenerates, or degenerate criminals, who are absolutely without the aid of any moral balance or restraint, one could not expect any such deterrent influence; but upon the mind and imagination of the degenerate criminal who still retains a modicum of control over his impulses, the fear of punishment would, I am sure, have a most lively influence. Next to his life the man of passion values his sexual organs.

In animals it is almost invariably found that when the individual is the possessor of a violent and quarrelsome disposition castration has a most happy effect, soothing irritability, calming passion, quieting anger. Many a stallion or bull, whose very presence made life dangerous and who would on the slightest provocation use his most passionate efforts to kill and destroy, has by this simple procedure been transformed almost immediately into a quiet, harmless and useful member of an agricultural community. So well known is this effect that the development of any dangerous phases in the disposition of a previously gentle and unmutilated animal is the signal for sexual undoing. In the female, which never exhibits the same degree of anger or passion as the male, "spaying" is also not infrequently performed to prevent breeding from unsuitable stock. Here also the same effects are noticed as in the male, though naturally to a lesser degree.

Reasoning from analogy it is only fair to conclude that this operation practiced upon certain cases of insanity with a homicidal tendeny, or upon habitual criminals of a violent and dangerous temper would have the same soothing and quieting effect.

Its range of usefulness might even be extended to cases of insanity of an intermittent type with a distinct hereditary taint, for these cases may be depended upon to propogate during their periods of sanity and to leave their fatal taint upon their offspring.

Rapists and seducers of youth might also in all fairness fall within the embrace of the law, the sentiment of the average community even now tending strongly in this direction. Many of these men are degenerates, many vietims of their own unbridled lust and passion. Thus to the former the operation would be remedial; to the latter punitive.

But a conservative view of the situation by jurists and criminologists, condemning to this operation at first only undoubted degenerates, and leaving to ordinary legal processes all doubtful cases, would establish confidence in the public mind, and likewise leave the way open to such an extension as experience and study would warrant. Conservatism would necessarily be the keynote of this change, as of all other radical changes, in the present penal system.

If it be possible to allay enough false sentiment to secure the enactment of a law providing for such a punishment—or rather a cure—the sentimentality that generally obtains in this nineteenth century can be depended upon to prevent any excess or abuse of the law.

That operation of castration is practically harmless, is evidenced by the frequency with which it is performed on animals,—and on men also. Among animals, where ordinary skill has been exercised, a death or even an untoward result is extremely rare. Among men, while the results may not be deemed as good, this is open to question, inasmuch as men are for the most part operated on by reason of disease of the parts, such as cancer or tuberculosis, which are alike progressive and fatal to the organism. In these cases the system is necessarily already weakened by the drain induced by the malady long before the knife is resorted to, and yet, even with such disadvantages, the operation if antiseptically conducted is a comparatively safe and simple one. Ovariotomy, or spaying, in the human female is a much more serious and complex matter, yet it has reached such a degree of perfection that the percentage of fatalities in uncomplicated cases is practically *nil*, even though (as with men) undertaken only for relief from disease.

How much more simple then, how much more expeditious, how much more safe, would this procedure be if instituted in cases of perfect *physical* health, the moral obliquity of the victim not being a contraindication.

For so far as human experience goes such moral obliquity has no deterrent effect upon the healing of severed or lacerated tissues, a bad man's flesh or an insane man's flesh healing as readily as the flesh of a good or a sane man, so long as it be physically sound.

In conclusion I wish to say that I believe the adoption of this operation would mark a distinct advance in the penal and corrective systems now in vogue; I also believe the majority of the world's advanced thinkers already favor this method of correction.

WM. M. DONALD, M. D.

DAVID INGLIS, M. D.

We have among us many human beings who are morally defective—these constitute a criminal class, the existence of which is a perpetual menace to the rest. Not only does this class constitute a menace to the safety of society but it is an increasing burden upon the industrious and normal citizens. We spend almost as largely for courts, jails and police as we do for schools, colleges, art museums and training schools. It costs as much to look after the wrecks of one generation as to build the fleets of the next.

There are two ways in which we may regard these wrecks of society. We may call them "the wicked", hold them up for condemnation and inflict upon them "punishments". The indictive idea has varied in ferocity but remains the same in essence as ever. Even in our modern and more temperate forms of punishment lurks the old idea of vengeance. Outbreaks of ferocity such as lynch-law are the natural outcome of such a way of regarding criminals.

There is, fortunately, a second and more humane view, it is that certain of our fellows start in life handicapped. They are usually defective from hereditary influences. They are born with an organism which condemns them to failure sooner or later. Others grow up to a similar fate as the result of damage to their nervous apparatus caused at berth or by disease in early infancy.

These unfortunates do not and cannot conform to the average type of their race and time.

These we term degenerates.

We have all come to agree that those degenerates whom we class as imbeciles, or insane, are freefrom all responsibility. No idea of punishing them would be tolerated, notwithstanding that these persons constitute a burden or a menace to those about them.

But these are not the only degenerates. Just as some men are born color blind others are born morally blind. As some children of impaired nervous organization develop uncontrollable muscular activities, others, from similar defect, cannot develope normal control over the passions or animal instincts.

It is a law of psychology that when individuals degenerate those functions of the brain which were last acquired are the first to be lost. The same law applies to the race. Man was an animal first—the higher attributes, which are the glory of the race, were laboriously acquired by later generations—when degeneration begins in the race the higher attributes fail, the animal tendencies assert

themselves uncontrolled. Our habitual criminals represent the product of this process. As the unfortunate products of degeneration they are no more justly worthy of punishment than the insane. Among the insane we recognize varying degrees of responsibility—so it is with the criminals.

The insane respond, in a certain degree, to the ordinary influences which control conduct. So do criminals.

So close is the parallel between the insane and the criminals that the facial expression, the bodily habits, the physical defects are strikingly similar.

Mount, on a large card, photographs of 100 prisoners at Jackson and on another, 100 photographs of the insane at an asylum (omitting those who had lost all menal power) and it would be difficult to tell which group was insane, which criminal.

Accepting, as I do, the view that habitual criminals are degenerates it at once follows that I entirely eliminate the vindictive idea. Having done so I then have no hesitation in advocating the castration of habitual criminals. To advocate castration as a mode of punishment would be barbarous. It is to be advocated on two safe grounds; first and foremost as a means of preventing the propogation of degenerates; second, for its deterrent effect upon such degenerates as are still capable of being acted upon by those influences which generally control conduct.

As to the first ground this is to be said: Inasmuch as the great majority of degenerates are the victims of hereditary defect there can be no doubt that a degenerate is specially likely to transmit to his children a degenerate inheritance. This is not a theory only, but abundantly confirmed by facts. Again, as the degenerate represents a relative preponderance of the animal over the intellectual and moral functions, the degenerate does not lose the power of propogating. Indeed the sexual impulse is usually the strongest impulse, the one most uncontrolled. We cannot trust nature to promptly end the generation of degenerates. It is the duty of the state to step in and end it.

At this point comes up the eternal conflict between the individualist and the socialist. The individualist will claim that the state has no right to maim a person who is not fully responsible.

The socialist on the contrary maintains that the welfare of society takes precedence of the rights of the individual. This principle is already fully recognized in practice—we confine the insane

not as a punishment, not, in many cases, as a means of possible cure, but for the protection of society.

We confine criminals—we ought to confine them not as a punishment, not as a possible means of cure, but above all for the protection of society. The castration of habitual criminals is advocated on the same grounds. Society has a right to protect the next generation from a brood of degenerates. Similarly just as many criminals are reformed by the discipline and training of modern reformatories, so the effect of castration might well have, in many cases, a curative effect. The entire change of temper and disposition effected in the horse by castration is strikingly suggestive.

As regards the restraining influence of castration for habitual criminals this is to be said. There are criminal degenerates in whom the possessions and immoral tendencies are so strong that fear of any punishment or discipline has no restraining influence. Such would not be deterred by the prospect of castration. There are, however, many who are still able to control conduct if stirred by some powerful influence. Inasmuch as, in the criminal class, the sexual impulse plays such a predominant part the prospect of being unsexed would exert a most powerful restraining impulse. Those familiar with the criminal class would, I feel certain, corroborate the statement that this would be something to be evaded by them, far more carefully than a term of imprisonment. For these reasons then it ought to be adopted.

As regards the details it ought not to be resorted to for first crimes or for petty ones. But if a man is convicted of a serious crime for the third time we are safe in regarding that man as a habitual criminal and his children almost certain to be degenerates. To allow such a man to bring children into the world is cruelty to his own children for they are born to sorrow, misery, degradation—humanity forbids it—to allow such a man to propogate is suicidal to society itself, for it is sowing the seeds of the disruption of society.

Since man, living in isolation, is a barbarian, since all the finer qualities of the race are the product of social forces the preservation of society is of prime importance to every individual in it.

The idea which commends the unsexing of criminals is not hatred of the criminal but love for our race. It should be adopted.

DAVID INGLIS.

J. J. MULHERON, M. D.

The question may be argued from several points of view; the right and duty of society to self protection, the deterrent influence of emasculation on the criminally inclined, the influence of heredity in the propogation of the vicious, the justice of maiming a human being, etc. A chapter might be devoted to each of these points, but the restricted space at my disposal prevents.

I should take the affirmative on each of those indicated. From the physician's standpoint, I will especially insist on the good results which would most naturally follow the removal from the criminal of this power of perpetuating his kind. While there are, doubtless, exceptions to the rule, the rule nevertheless obtains, beyond a question, that 'like produces like.'

This is a law of both vegetable and animal life, recognized and taken advantage of by agriculturist and stock raiser.

In resorting to emasculation, I would select only the unquestionably degenerate, making due allowance for those who sin, through stress of peculiar temptation, or the sudden impulse of passion.

To the rapist and the violator of the immature child, I would, however, extend no mercy. These are degenerates whose seed should be cut off. They should be accorded no opportunity to reform.

In the case of criminals of less heinous kind, a series of convictions, (sufficient to establish a fixed bent or tendency), might be required as a condition for the infliction of emasculation.

The spartans build up a verile citizenship, by allowing their weaklings to perish in their infancy. We may produce a race morally strong, by preventing the perpetuation of the tendency to crime.

J. J. MULHERON, M. D.

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JOHN E. CLARK, M. D. F. C. S.

The pleas at present so generally being made by leading medico-jurists for a change in our criminal laws, to the effect that the punishment of crime and reformation of certain criminals and the insane can be promoted by emasculation of men and ovariotomy in women has gone to such extremes as to almost permit its character-

ization as a fad. The arguments in its favor can be briefly summed up as:

1st—The horror inspired by the punishment is such that it will act as a deterrent, and

2nd—That it limits the reproduction and transmission by heredity of the defective and criminal classes of society.

Now as to its deterrent effect; this I think should be taken *cum grano salis.*

Emasculation is no new departure in punishment, and experience teaches that its adoption has never succeeded in eliminating or even correcting abuses for which it has been accepted. Gibbons very justly observes, that: "Whenever the offense inspires less horror than the punishment, the rigor of penal law is obliged to give way to the common feeling of mankind."

The laws of Constantine recognizing that the successful ravisher should be punished adequately with the enormity of his guilt, condemned the criminal to be torn in pieces, burned alive or put to death by having melted lead poured down his throat. And rulers such as Ezzelin, Da Romani, Henry I., and many others have tried castration with the result that it is only a memory of failure. Its incompatibility with human judgment in the mass, precluding its general application.

The futility of enacting penalties for crime which are abhorrent to the coarser feeling of mankind, has many illustrations: — In Great Britian in 1509 theft was punished by hanging, thieves were often hung twenty together upon one gallows, yet, Knight says "Thieves were in every place," and farther states "people were taken up every day by the dozen like birds in a covey, still they never ceased to rob and murder in the streets."

In 1763 "the game laws were retained with relentless severeity, and, during the reign ot George III., sixty-three new capital offenses had been added to the criminal laws, and five new ones on an average, continued to be discovered annually, so that the code of England seems written in blood," but with all this severeity, history shows the deterrent effect of excessive punishment unsatisfactory, and a return to a more reasonable and humane code, the inevitable result.

Recently, W. S. Elliot pleads for charity in surveying the terrible crimes which are being committed in the community, and makes the statement "that nearly all of them are the result of conditions for which the so called criminal himself is not responsible.

I do not believe that we will be able to devise any method which will cure all crimes." He says, "I think it would be a very unfortunate step to proceed to the punishment of criminals in this way. I do not think that any of us have yet arrived at that degree of perfection where we dare to reach out our hands and lay them upon any single fellow being and say, we will deprive you of that which God invested you with first, when, he said, "increase, multiply and replenish the earth." If you have that right you have the right to kill a man and you have the same right to kill a man you have to castrate him.

Unreasonably severe punishment when applied to offenses is one of the methods by which society manufactures crime, and that castration is an excessive punishment is admitted by all advocates of its adoption. If this method be applied to one for a given crime, it must follow that under the same circumstances it should be applied to the other; but how absurd to apply this method to senile or impotent criminals, who frequently make up a large proportion of those committed for sexual criminality.

It is well known that natural impotence is no guarantee against the commission of a sexual crime.

What guarantee have we that artificially induced sterility will be any more of a restriction. 2nd—That it limits the reproduction and transmission by heredity of difusive and criminal classes of society.

Darwin, Wallace, Maudsley and others take this position: "Heritage is that possibility of the organism by which its peculiar nature is transmitted to its descendents," and we are hearing at the present time all over the world again and again the words of Gaulton, that, "The way to better a race is the prevention of the more faulty members from breeding;" and that, "when a man has been diagnosed as a natural criminal and placed under confinement, he certainly should be deprived of the right to influence the next generation sure to be like himself." This I believe to be the text of modern medico-legal reformers. There seems to be a consensus of opinion that there is but one proper method for the betterment of the human race and that is that above indicated. But it has been tried, the "proper method" has been tried often enough but failed.

It does not necessarily follow that a criminal is going to procreate a criminal no more than it follows that the brightest and most "intelligent minds are the production of uncriminal ancestors, for some of the most brilliant minds that have dazzled mankind, are

nothing more or less than abnormal forms of concealed lust, and some of those names which dazzle history, some of those which have shown brightest in a constellation of literature are bright and brilliant and coruscating simply because of the result of abnormal conditions and had they not taken that form might have taken some criminal form. Who has not been thrown in contact with men whose minds are not as bright as the morning star, but who were vicious as hell at heart and capable of the most damning offenses against society."

Men of intelligence by no means indicate purity of heart and power of character, nor can we say that a person of health, vigor, powerful mind and physical courage will not be the procreator of criminals and crime. Who does not know of men of physical strength and mental power who have become the father of dwarfs and insignificant progency. The sons of the greatest advocates of purity law and order have so frequently strayed from the footsteps of their fathers that it has become a proverb: "Oh, his mental status and criminal proclivities can be readily accounted for, his father was a clergyman, or minister."

Recall if you can to your mind, scholars from the great Washington down to the great galaxy of statesmen who have dominated our political world and our American statesmanship. How many of them have sons who have risen to anything like the commanding positions their fathers held, and on the other hand how many brilliant sons from indifferent sires have left their mark upon the pages of history ? In view of this does it not seem that generalizing from a fact or group of facts may lead us into fatal error, and that we are not authorized to lay our hands upon a citizen and say, "You have forfeited the inherent natural rights with which the Almighty God invested you."

In the Ohio State Sanitary Association, it was unanimously considered advisable to recommend proper legislature to protect the innocent from disease. It was therefore, Resolved: "That it is the sense of the Ohio State Sanitary Association that syphilis be made a legal bar to matrimony." This was adopted unanimously without any qualification—an illustration to the length to which pseudo philanthropy will carry impressionable scientists. This action is right in line with the proposition to asexualize criminals, but in my mind is less condemnable, unless confined to the active stage of the disease, as unfortunately it is too frequently demonstrated, that a legal bar to matrimony has little effect in curtailing the propogation

of the disease. We must recognize that the spread of the disease and its effect on posterity is not confined to those who have entered the matrimonial alliance.

It seems to me that were it demonstrated that all syphilitics procreate syphilitics and that the disease is as terrible in its effect upon future generations, as the above learned association assumes, the only logical remedy would be the one recommended for criminals that of asexualization of all attacked, liable to be attacked, or exposed to the dread malady. A *reductiro ad absurdum*, but not more so in my opinion than that of castration to prevent procreation on human beings assumed to be liable under proper (or improper) conditions to develop into persons of criminal tendencies.

JOHN E. CLARK, M. D.

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CHARLES W. HITCHCOCK, M. D.

Advances come with growth of public sentiment and their permanency and utility are usually in proportion to the health and vigor which such sentiment attains.

Asexualization of degenerates would fail utterly of its object, were such a step attempted before public sentiment has been so educated as to demand such extreme means for the preservation of society as against the individual. Much is said in a glib and indefinite sort of a way in advocacy of the castration of degenerates; but few, if any, of those so advocating the measure, will at once tell you just how far they would have it applied. The fact is, that the term "degenerates" is used as yet in a loose sort of a way. The criminologist applies it more to the habitual criminal than to the unfortunate defective or epileptic, who, perhaps, has shown no criminal tendencies whatever, while within a year, I heard a scholarly alienist argue that hysteria must be considered as one of the stigmata of degeneration, and the logical conclusion is that his list of degenerates will include not only the defective, epileptic and habitual criminals, but all those, also, who give any history of hysterical attacks. This brings us at once to dangerous ground, and makes evident, the necessity of more definitely limiting the term "degenerates" in such a consideration, so that it will simply include those who are without doubt members of a class, which, in one way and another threaten the welfare and perpetuity of society. There can of course, be no doubt that "Twere a consummation devoutly

to be wished" that the procreation of imbeciles, idiots, epileptics and habitual criminals, should be forever and effectually prevented; but it may be well doubted if the time has yet come when love of the public weal so far outweighs selfish and personal considerations, to say nothing of parental and filial affections, that a healthful public sentiment will stand sponsor for so radical a step as the legal castration of degenerates.

Believing firmly that public sentiment is as yet far short of warranting or tolerating such a procedure, I hold to the opinion that such an enactment would at the present time be a positive detriment to the State of Michigan.

A bill having such an object somewhat loosely and crudely framed, was introduced in our last legislature, and it has seemed to me fortunate, that it sleeps in one of those many pigeon-holes, from which no bill returns.

Much can be done in an educational way with our defective and epileptic children. It is astonishing how much has been accomplished by painstaking, careful work with these unfortunates, and it has been amply proven that they can be made useful members of the community. It is true that their marriage is to be deplored, and this should be prevented. It is also true, that the public sentiment of the present will interest itself in throwing about these wards of the state, safe-guards and incentives to be of use to society, and will gladly aid in preventing their intermarriages by custodial care, while, jealous of the rights of the individual, it would coldly deny any comfort to provisions for preventing posterity by personal mutilation.

New York has set a noble example in efficient work of this kind, in its Craig Colony for Epileptics at Sonyea, where a property of some 1900 acres, wonderfully adapted for the use, has been acquired by the state, and already over 200 epileptics are members of the colony. Tho' the plant is only partly developed, as yet, the ratio of patients earnings to the cost of their maintenance, during the year ending September 30th, 1897, was over 50% and this will in time doubtless be much increased. In such communities education and custodial care will prevent intermarriage, and such attempts at sociological reform will receive the warm approval of public sentiment, which they so richly deserve.

In our own state, it is to be hoped that our State School for Defectives and Epileptics at Lapeer, has a noble and useful work before it; but how hampered it would be were such a bill to become

law, as that introduced in our legislature, which proposed to authorize the superintendent of any state institution, under certain conditions, to subject any defective or epileptic inmate to the operation of castration. In view of the recent establishment of this state institution, any such law, it seems to me, would be nothing less than a great misfortune, which would at once tend to thwart the very objects of the school; for every father, and every mother, of every defective child, instead of eagerly seeking for their children the advantages of such an institution, as they doubtless will do,—would, with the existence of such a law,—far rather zealously conceal their defectives and epileptics, nor would they, under any circumstances, knowingly have their off-spring subjected to personal mutilation.

But the ranks of criminals ars not largely recruited from the number of the defectives (as would be cared for in such a school), nor from the epileptics. Custodial care will do better for these classes, but for the habitual criminal, as proven by repeated conviction, castration seems particularly well-fitted and the fact that here society is in position to exact some forfeit of the individual seems to "make the punishment fit the crime". It may even be healthful in its deterrent effects upon crime, that the operation have punitory aspect.

For the criminal guilty of rape, bestial assault or incest, castration would seem a particularly fitting and deserved part of judicial punishment, and a public sentiment which, not without reason, would hold up its hands in horror at proposed castration of defectives (feeble minded, imbeciles, idiots and epileptics), would heartily approve, applaud, and support some such law as that so crudely hinted at here.

CHAS. W. HITCHCOCK, M. D.

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CHARLES S. MORLEY, M. D.

The defective, degenerate and criminal classes, both native-born and imported, are undoubtedly the product of some organic defect, in the social organism which has brought them into being.

Instead of their origin being clothed in mystery, it seems to be singularly clear. Their destiny is even more manifest than their origin.

It is notorious that we have more than our share of these social parasites; and that it is high time to call a halt upon European immigration of these classes to our shores.

They threaten to clog reproduction; and by mingling their degenerate and vitiated blood in the life stream of this fair nation, it is thought an evil is impending of stupendous moment.

Moreover they are already a mighty burden upon the community which must not be permitted to increase and ought to be speedily diminished.

A remedy has been proposed and strenuously advocated by men of ability and information.

Laws have been proposed by which to apply such a remedy that something may be done toward the extermination of these classes.

The most radical measure proposed has been called the "Asexualization" Act, which we are asked here to discuss.

It certainly is a subject which ought to be discussed in a dignified and high minded way, and from a point as remote as possible from prejudice or capricious fancy.

The laws of Nature are too potent for puny man to oppose; they are too inexorable for him to attempt to abrogate; they are too grand as they become manifest in the stately procession of events, for him to imitate.

It is necessary therefore, to approach a subject so full of significance to our race with caution and circumspection.

At first thought it seems that the wholesale castration of the inmates of our great elymosanary institutions would clear the muddy stream of hereditary taint. At first glance it would seem to be a certain and adequate remedy for threatening ills.

That it would accomplish something, cannot be denied. What it would and would not accomplish is worthy of discussion. To my mind the case presents itself somewhat as follows, viz:

*a)* The castration of all inmates of public institutions for the care of the criminal, insane and defective classes, would show in the course of a generation, a small per cent decrease in each class.

*b)* That it is erroneous to suppose that such a sweeping use of the remedy would greatly reduce the number in either of these classes.

Such a conclusion rests upon an entire misunderstanding as to the genesis of this kind.

*c)* That abnormal types are not as a rule fruitful.

The "unfit" tend to perish as surely as the "fit" tend to survive

In a word, Nature herself, interposes the most effectual means

against racial degeneracy.

*d*) Also, it should be noted that the inmates of institutions rarely propogate their species and that for every one in an institution, there are a great many not in an institution, who may propogate.

But before proceeding to elaborate the over shadowing import. ance of this great Natural law as a corrective of racial degeneracy, let us digress a little for the purpose of taking a competent survey of the field of inquiry presented here in this Western hemisphere. We are told at the outset that here, at least, three distinct races, had perished from natural causes before the advent of the Anglo-Saxon, and others point out that here and there are evidences of the degeneration—real decay—amongst our people. The fact seems to be that some seventy millions of human beings of the most diverse origin, are here engaged in the struggle for existence and that the phenomenon of racial amalgamation is proceeding upon a grand scale as a great involuntary experiment in breeding a race which shall inherit the land.

Already some characteristics of the new race in process of evolution may be discerned. Here a little, and there a little will be added from generation to generation, until this hetergenous mass of humanity amalgamate in several distinct types or become one homogenous whole. The protestant New Englander, with a birth-rate of one to seventeen, cannot endure against the Catholic foreigner with a birth-rate of one to six, the expectation of life being the same.

It would seem perfectly certain that the puritan stock must rapidly lose its identity and that it will persist as a factor, only by amalgamation with the warm tide of foreign blood.

Attention should be directed to the fact that the influence of the mother is many fold greater than that of the father, as regards inheritance: and it is precisely for this reason, coupled with the blighted reproductive activity of our American wives, that we are forced to entertain the most serious doubts as to the persistence of the unalloyed blood of our fathers.

I take it, that the chief ends aimed at by publicists who advocate castration for defectives are, (*a*) to purify the race, and (*b*) to remove the heavy and increasing burden of supporting these wonderful institutions for prolonging vicious lives.

*Returning then to the main question, we argue that the defective classes tend to perish by process of Natural law.*

It is said that about five millions of our people have been

infected with syphilis; a very large proportion of this number are foreign-born and live in the cities. Syphilis is perhaps the most prolific source of defective organization. It is powerfully reinforced by the abuse of stimulants, narcotics and fast living, generally, *but syphilis has the most powerful tendency toward sterility, abortion and still-berth, with a very limited prospect of maturity for the per cent. of the children born living.*

Few, indeed, of the victims of inherited syphilis who may reach maturity will beget children, who will reach maturity, and the tendency to extinction of the family is greater still if father and mother are each infected. And yet, any competent observer must admit that *syphilis is a prominent factor in the production of criminals, paupers, insane and defective.*

If we add to syphilis alcohol and "fast" living, which so commonly go hand in hand, we shall embrace a large proportion of these classes directly or indirectly, as springing from these sources. *Yet they have one inevitable destiny, and that is to perish.*

Castration might add a little in limited groups to the downward momentum, but in sight of the larger view, it is clearly inadequate. *It does not strike at the root of the disease. It only strikes feebly at a few of the half blighted fruit-buds, most of which must by natural law, fail of fruition.*

It may be said in further elaboration of the foregoing principles, that the defective classes tend to perish through the improvidence and excess of criminality, and the tendancy toward vicious associations of the weak. *Even when prolific, their progeny perish by the thousands.*

The prodigal hand of Nature places the fruit of love in the arms of Motherhood. Heedless of the affection born of suffering and self-sacrifice, as well as the pangs of sorrow, over the death of the object of it all, Nature, in kindness, takes to herself the vast majority in the innocence of childhood—and who shall say that this vast sacrifice is not necessary to preserve the instinct toward maturity in the race.

Who is so wise as to be able to say with certainty, this life will be worth living, and this will not.

I cannot escape the conclusion that a plan for purifying society and ridding the body-politic of its parasites, if we are to expect much from it, must be framed upon broader views than that expressed by the monstrous term "Asexualization."

CHARLES S. MORLEY, M. D.

ORVILLE W. OWEN, M. D.

"Thou shalt not kill."

"For I, the Lord thy God, am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation."

"An ounce of prevention is worth a pound of cure."

"The parents eat sour grapes, and the children's teeth are set on edge."

Commandment, prophecy and adage, answer the question of castration and legalized death of insane, idiotic and criminal men and women. By what right do we arrogate to ourselves, the law of life, and death in disease? Insanity is disease, idiocy is malformation, therefore disease, and the writer believes crime is disease.

All impulse comes from nerve force, that is nerve energy is exploded in some one direction, this is impulse, good or evil; what is good in one direction, becomes evil in the other. Centralization of thought is the fundamental note of brain development, but one idea becomes insanity, if then the centralization takes the form of crime, and the one idea is to steal, the impulse is sent by nerve explosion, so to speak, through the brain cells and a thief is the result. What is the condition of the brain cells that generate evil impulse? Are they normal or abnormal? The theory of castration, death, imprisonment, hinges upon these points. We may beg the question as we please, but it comes to this in the end, and if the writer is correct in his assumption, that all insane, idiotic or criminal people are diseased, the whole matter resolves itself into diagnosis, treatment and cure, not by murder or maiming, but by intelligent, psysiological and physiological means. To shut one of these sick people up in an asylum or prison, and only feed, clothe and keep him, is no more rational treatment, than to leave a patient with brain fever without medicine to get well or die as fate shall decree, the one is as much malpractice as the other. Men are prone to revolve around their own little centre and think the ephemeral life they are living to be the all, they look not backward nor forward, except upon the converging rays of their own eyes.

If the advocates of castration would but follow their own line backward, the writer will guarantee that they will somewhere find an ancestor, who, were he living to-day, would be placed in the category of criminals, and be a fit subject for castration or death. "Out of evil cometh forth good," and no one will deny, that, looked upon in the light of to-day, King David was a criminal, had he

been "operated" upon, the Messiah would not have been born to enlighten and save the world. Julius Caesar, Henry IV. of England, Napoleon Bonaparte were all epileptics and under the castration folly, would have been made enuchs, and the history of the world changed. "The lunatic, the lover and the poet are of imagination all compact," and, as the gentlemen of the law say, under the ruling, should be emasculated. Ye gods, what a world these advocates of murder and mayhem would make, a land of spayed women and piping vocal "its".

"Neither beast nor human, neither man or woman" just ghouts. Asia brought into America, China into the United States, barbarism grafted upon civilization. Oh, begin at the root, do not lop off rotten branches, begin with the abject poor, feed them, clothe them, teach them, but don't cut them; build up the smoky chimney till it draws, wash the dirty clothes and grind off the rough edge of the pebbles on the beach.

ORVILLE W. OWEN, M. D.

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CLARENCE A. LIGHTNER,

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The medical phases of this subject have been ably treated in several monographs published by medical men which have come to my attention. What I have to say will be confined more to the legal side of the subject.

Legislation regarding the criminal and the insane has hitherto been directed chiefly to protecting the public against the immediate damage likely to result from these classes, and legislation has been, largely, confined to the temporary restraint of the subject. The members of both of these classes have been allowed to marry and procreate without legal restraint.

The increasing numbers of criminal and insane persons, in this and other countries, has, in recent years, attracted the attention of Medico-legal and other scientists and a considerable discussion can be found in recent medical literature as to the best means of counteracting this tendency.[1]

It may be admitted that the question, how great the influence of heredity upon the reproduction of these classes is, is a debatable one. To whatever extent the views of scientists upon this subject

may differ, there would seem to be no doubt that the result of the early associations with which the children of the criminal and the insane are necessarily surrounded and of the education which they receive, must be very injurious to them. Under our ideas of personal liberty and of the rights and duties of parent and child, it would seem to be impracticable to separate such children from these influences. The only effective solution of this problem appears to be, to limit procreation by these classes.

Several plans by which this may be done have been suggested and have found favor in the minds of different scientists. [2] Among these proposed systems may be mentioned the following: (1) colonization; (2) prohibiting the inter-marriage of persons included in these classes; (3) the asexualization of the criminal and the insane.

[3] I shall deal only with the last of these plans, and, as above stated, shall limit myself to some of the legal questions suggested by a consideration of the laws which it has been proposed to enact.

Assuming, then, that asexualization, enforced by law, is advisable, what limitations are there to the power of the legislature to provide for this remedy? Entirely different rules must be considered when it is proposed to apply the law to the insane from those which would be pertinent to the criminal class.

The legislature, undoubtedly, has the power to prescribe the punishment for crimes, and it may adopt a law which, while punishing the criminal, is designed also to protect or benefit the public. The one constitutional limitation, which is pertinent to this discussion, is the clause which prohibits [4] "cruel and unusual punishment." Unless asexualization of the criminal as a punishment for crime can be said to be "cruel and unusual" in the constitutional sense, there would seem to be no doubt that the legislature could enact a law providing for this penalty.

There have been but few decisions of the courts construing this clause of the constitution, and it does not seem possible to determine, with any great certainty, whether asexualization would be said, by the courts of last resort, to be cruel and unusual punishment for crime.

As throwing light upon this question, the following may be suggested. Punishment for crime, to be obnoxious to this clause of the constitution must be cruel and unusual. The mere fact that the kind of punishment prescribed is novel does not render the legislation void. Doubtless, those degrading punishments, which were usual at the common law but which had become obsolete before the

formation of our state governments would be held to be forbidden by our constitutions and to be cruel and unusual, but, unless the punishment prescribed is such as to shock the moral sense of the people, the courts are not likely to set aside the statute. This is the view expressed by Judge Cooley.

The litigation consequent upon the enactment of the electrocution law in the State of New York is most instructive upon this point. [b] A study of these opinions, sustaining electrocution, shows that, unless it can appear from the terms of the statute in question and from those facts of which the court can take judicial notice, that the law violates the constitutional provision, it should be upheld.

My conclusion, though arrived at with some hesitation, is that the law, providing for asexualization as a punishment for crimes, at least of a serious character, would be sustained.

Next, I consider the question, as it relates to the insane.

A law providing for the asexualization of the insane can, of course, not be justified on the ground of punishment for crime.

The relation of the state to the insane has been well said to be that of a guardian to his ward. It is the duty of the state not only to protect the public against the violence of the insane but, also, to care for the insane person, as it is a guardian's duty to care for a minor. Thus, aside from the duty of the state to provide treatment for the voluntary insane, it is within its power to treat the insane (although he be not dangerous to the public and not consenting) for the benefit of the insane person himself, so long as a cure is reasonably to be expected; but it would not be permissible to restrain the harmless insane of his liberty, if there were no possibility of improving his condition by treatment. (Tiedeman upon Limitations on the Police Power, 105 to 107.)

The protection of the public is the chief purpose of the police power of the state. It has been said that the police power "extends to the protection of the lives, health and prosperity of the citizens and to the preservation of good order and public morals," and any law which is fairly designed to accomplish this object will be sustained as a valid exercise of this power. It is only under the police power that a law providing for the asexualization of insane persons can be upheld.

In considering the extent to which the legislature may protect the public against contagious diseases, Mr. Tiedeman says: "The remote or contingent danger of society from the inheritance of dis-

ease by his children would be no ground for interference; the danger must be immediate." (Limitations on the Police Power, Sec. 42 p. 103.) The author does not discuss this phase of the subject at greater length nor does he cite authorities in support of this view.

Our conclusion as to the validity of such a law affecting the insane is, in brief, as follows: 1) Such a law would, probably, at the present time, be held to be unconstitutional; 2) the public for whose welfare the police power at present exists does not seem to include future generations; 3) possibly, with increased knowledge on the part of the public of the need of restraining the increase of the insane classes, the scope of the police power may eventually be extended (as it has been in other directions) so as to include future generations within its protection; 4) if no other means are found to be effectual, the asexualization of the insane may finally be upheld on this ground.

One of the chief needs in urging the adoption of legislation to accomplish the result I have been considering, is to limit one's demands upon the legislature to a law which will not only be a valid exercise of its power but which will also meet with the approval and support of a large portion of the public. Otherwise the law will be likely, if not held to be void, at least, to become inoperative.

CLARENCE A. LIGHTNER.

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NOTES.

1. Statistics as to the increase of the criminal classes are scarcely needed. At a joint meeting of the Board of Asylum Trustees held at Kalamazoo on November 19, 1896, it was stated by Dr. Samuel Bell, Superintendent of the Asylum at Newberry, that there was an increase of 300 patients, each two years, in the insane asylums in Michigan.

2. In the year 1895 the Legislature of Connecticut passed a law making it an offense for any epileptic, idiotic or feeble-minded person to inter-marry or for anyone to aid or abet the marriage of any such person.

3. A bill was introduced by Mr. Edgar in the last Legislature of the State of Michigan and passed the House of Representatives, which provided for the asexualization of the inmates of the home for the feeble-minded and epileptic and for persons convicted of a felony for the third time and of any person convicted of the crime of rape in any public place. It is, also, reported that there was introduced at the last session of the Kansas Legislature a bill of similar import, except that it was limited to those found guilty of certain crimes. Neither of these bills became law.

4. Article 6, Sec. 31 of the Const. of Michigan reads, in part, as follows: "Cruel or unusual punishment shall not be inflicted." Art. 8, of the Amendments to the U. S. Const. reads, in part, as follows: "Nor cruel and unusual punishments inflicted." The conjunctive "and" is usually found in this clause of the various State

Constitutions. It does not seem, from the Michigan decisions, that the disjunctive "or" would be held to give a different meaning to the clause.

5. The opinions in the chief decisions upon the New York electrocution law are to be found as follows:

People vs. Durston, 55 Hun. 64.
People vs. Durston, 119 New York 560.
People vs. Kemmler, 119 New York 580.
In re Kemmler, 136 U. S. 436.

See, also, upon this general subject, the case of McElvaine vs. Brush, 142 U. S. 156, affirming People vs. McElvaine, 125 N. Y. 596.

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If it be true that a bill of this kind affecting the insane would be invalid, it would undoubtedly be invalid as affecting degenerates such as the feeble-minded.

# THE LAW OF TRADE-MARKS.

BY CHARLES F. BURTON OF THE DETROIT BAR.

(*Continued from November Number.*)

## THE ORIGIN OF TRADE-MARKS.

By the common law, the manufacturer or factor of goods, he who either himself manufactures or selects and prepares for market, goods that have been manufactured by others, has a right to designate them by peculiar name, symbol, figure, letter or device, by which they in time come to be known in the market as his own, and come to be distinguished from other like goods manufactured or sold by other persons.

This mark or symbol chosen by the merchant, becomes his property, if at the time he made choice of it, it was not in use by any one, as a trade-mark with the same class of goods.

The selection of the mark is termed "adopting it" but the adoption of the mark is not sufficient to confer on it the attributes of property, unless the selection is followed by the use of the mark in connection with goods; thus trade-marks have their origin in selection merely, and the origin is followed by property rights, which come with use, and increases in value as the use becomes more extensive. The selection alone, is not sufficient to establish property rights, but must be followed by use. (Proctor & Gamble vs. Columbia Manufacturing Company. 44 Commissioner's M. S. Decisions, 300.

The extent of the use necessary before the property right will be considered as established depends upon circumstances and has perhaps never been exhaustively considered by any court. Generally where trade-mark rights have been discussed by the court, the mark

of one of the parties has been so long established and has become so widely known, that the opposing party does not lay claim to the trade-mark as his own. In a few cases, however, both the contesting parties have claimed the ownership, and the courts have been compelled to consider the question how extensive the use must be before an exclusive property right accrues to the user.

In an English case (Collins Company vs. Brown, 3 K. and J., 423) the court said:

"The question is, has the plaintiff, by his appropriation of the particular mark, fixed in the market where his goods are sold, a conviction that the goods so marked were manufactured by him; and if so, and no one else has been in the habit of using that mark, another man has not the right to use that mark so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to be in the habit of using it."

In the American case of Levy vs. Waitt, 61 F. R. 1008, the plaintiff had adopted a trade-mark in 1878, under which he had sold one consignment of 5000 cigars. In 1884 he sold a second consignment under the same trade-mark, and in 1889 he sold others. This was considered not to be a sufficient use to entitle him to exclusive property rights in the mark, as against the defendant, who in 1885, had begun to sell under the mark, and between that time and 1889 had built up a large business.

In another American case (Kohler Manufacturing Company against Beshore, 59 Fed. Rep., 572) the plaintiff's predecessor in 1889 began putting on the market a medicine which was sold in bottles on which there were written labels, and of these bottles he sold several dozen during November and December, 1889. In 1890 the plaintiff, an incorporated company, applied for and procured a certificate of registration from the patent office, for a trade-mark. In 1892 the defendant applied for registration of a trade-mark, and in 1892 the plaintiff brought suit against the defendant for selling, what it claimed was an article infringing the trade-mark adopted and used by it. It was held that the use was not sufficient to establish rights of ownership in this mark, the court saying:

"It may be that the interference of a Court of Equity does not depend on the length of time the name has been used; and that the rule is, that he who first adopts a trade-mark acquires the right to its exclusive right in connection with the particular class of merchandise to which its use has been applied, nevertheless, however short the time may be in which a person may acquire a title to a

trade-mark, there must be shown an actual intention to acquire such a title, and mere casual use, interrupted, or for a brief period, would not support a clain, nor will a Court of Equity recognize by injunction, a proprietary right in the phrase or name, unless it has been used in such circumstances, as to publicity and length of time, as to show an intention to adopt it as a trade-mark."

In Menendez vs. Holt, 128 U. S., 514, the facts were, that the plaintiff had established a large sale of a certain grade of flour, under a certain trade-mark; the defendant began to use the trade-mark, and claimed rights because third parties had made a prior public use of it some twenty years before the plaintiff had commenced to use it. This fact was held not sufficient to prevent the plaintiff from having his injunction.

Two of the cases which have been referred to are more pertinent to the question of the loss of rights by abandonment, than to a failure to acquire rights by only a limited use of the trade-mark in connection with goods that are placed on the market, and the cases referred to are the only ones that I can find which treat of the subject of the extent of use that is necessary in order to establish proprietary rights, and the conclusion to be deduced from them would seem to be, that where two parties are rival claimants for the same mark as a trade-mark, with the same or similar classes of goods, that the court must take into consideration all the surrounding facts and find the ownership to be in the one who seems from the facts to be most justly and equitably entitled to use it.

It is probable that the court would consider as pertinent to this question the rights of the general public. Trade-mark law has its foundation and growth on an asserted right of the public to be protected against the fraudulent representation of a dealer; and where two dealers have adopted trade-marks so similar that there would be danger in the public purchasing the goods of one supposing they were purchasing those of the other, it is probable that the court would find that one dealer who had acquired a large sale of goods, over a broad extent of territory, was entitled to the trade-mark, as against another dealer who had acquired only a very small sale of goods and over a very limited territory.

This seems to be the conclusion reached in the cases referred to above, although the courts have not used exactly this form of language in announcing the results arrived at.

It would be possible to conceive of a case where the rights of the several parties were so evenly balanced, that the court might

conclude that neither party was entitled to the exclusive property right, but no such case has arisen hitherto. Such a case would probably be decided in a way similar to those cases where the court is unable to say that either party is entitled to an exclusive right in the mark as was held in a case between parties having the same name "The law gives to a manufacturer the right to use his own name as a mark on his goods, although it be the same as that of another manufacturer of similar goods who has previously made his name a part of his own trade-mark, if in such use by the former there are no false representations. Because of confusion resulting from the use of identical names with distinguishing symbols there is not necessarily as a matter of law a fraudulent misrepresentation; actual fraudulent intent remains to be proven as a fact. If the first appropriator adopts the name simply without an accompanying word or symbol by way of prefix or suffix, another manufacturer of similar goods having the same name may lawfully impress it on his goods, if he accompanies it by such distinguishing device by way of prefix or suffix so that a consumer who will take note of the whole will not be misled. And if consumers who take note of nothing but the name are misled and there is consequent loss to either it must be borne as the result of the act of taking a name as a trade-mark. (Rogers' Manufacturing Co. vs. Stimpson, 54 Conn. 527.)

The right once acquired may be lost by the failure to continue the use, as was said as a dictum in the case of Menendez against Holt.

The use must be in connection with goods; the mere declaration of a person that he claims property in a word as his trade-mark, cannot make it his property, however long may be the time through which he continues such declaration. The use of the mark on price-lists, circulars and advertisements will not establish the right if the name is not used on the goods sold, (see Candee vs. Deere, 54 Illinois, 439.)

The statement that the mark is indicative of origin may mean either of two things:

First, that the goods sold under the mark are made by a particular individual, or,

Second, that they are made at a particular place or factory. When the mark indicates manufacture by a particular person, it would be fraudulent to transfer the mark to some other person and allow the business to be carried on by the purchaser, under the pretense that it is still carried on by the original manufacturer, and

Equity would not protect one dealing in that way; consequently when a mark is indicative of a mark of this kind, is transferred, the purchaser must make plain the facts of the transfer, and the facts of the change of manufacturers in some way in connection with his mark. When however, the mark comes to be indicative of a place of origin as distinguished from the original maker, it is entirely immaterial whether the fact of the transfer of ownership be indicated in connection with the trade-mark or not.

Stradivari, could not have transferred his skill as a manufacturer of violins, and it would have been entirely improper for him to transfer to any one the right to sell violins under his name as though they were made by him; but almost any one may become proficient in the manufacture of foods (like flour) and consequently when a mill in which a flour sold under the name of "Champion Flour" was transferred from one owner to another, the right to use the word as a trade-mark, passed with the mill. (Atlantic Milling Company vs. Robinson, 20 Fed. Rep. 215), and almost any one may become proficient in the manufacture of candies; consequently when a firm that had been manufacturing and selling candies under the trade-mark of "Oakes" transferred their business, the right to the trade-mark passed with the business. (Oakes vs. Tousmierre, 4 Woods, 547.) That is, there are some articles that require a peculiar skill in their manufacture, and this peculiar skill is attainable by certain gifted persons, who are not able to impart it to purchasers; where this is the case, and a trade-mark used by such a gifted individual is indicative of origin with him, the mark is not assignable.

(To be continued.)

# MICHIGAN LAW JOURNAL.

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ROBERT T. SPEED, Editor.

## *EDITORIALS.*

In this number we publish articles from a number of Detroit's leading physicians on the subject of asexualization as applied to criminals, the insane and degenerates.

The subject has been ably discussed in all its phases, and the value and importance as well as the demerits of the plan are fully considered.

In the preparation of this subject for publication it became necessary to interview a large number of physicians and I found a very strong sentiment—sentiment amounting to enthusiasm, in favor of the legislation contemplated. And this is somewhat surprising in view of the fact that this plan to "Asexulate" is yet in its infancy, novel, and somewhat radical.

But, however, after all this is easily accounted for. Out of the great mass of so-called reformers none can be more certain in effect than "Asexualization."

Even those who oppose the scheme admit that it would materially reduce the ranks of criminals and tend to abate the prevalence of insanity and degeneracy. The subject of heredity has been

reduced to an almost exact science, and it is universally conceded that physiological defects are transmissible; but questions often do arise as to the psychology of heredity or the mental characteristics of heredity. But even here it has been repeatedly affirmed by many distinguished authors that traits of mind or character are hereditary.

Thus in Despine's Genealogy of the Christian Family it is plainly illustrated that criminal instincts or tendencies are hereditary, and Ribot on his work on Heredity holds that from one-half to one-third of all cases of insanity are hereditary. Numerous authors might be quoted to the same effect. It is undouhtedly the knowledge of such facts as these that lead a physician to favor castration. He is a daily witness of the harmful effects of heredity and knows that castration is the most certain remedy over conditions, which, under any other plan we should have no control. On the other hand the layman who has but a limited knowledge of the direful effects of heredity would probably oppose asexualization. Sentimentalism would have full play.

It cannot be denied, however, that asexualization, like all other reforms, has its faults. Thus, Dr. Clark reminds us that "It does not necessarily follow that a criminal is going to procreate a criminal no more than it follows that the brightest and most intelligent minds are the production of uncriminal ancestors."

Some may consider this a fatal objection to the castration theory. Certainly it is entitled to serious consideration. "Who shall say that a criminal will procreate a criminal" is a pertinent question and reminds us that we must approach this subject with caution.

## *LEGAL MISCELLANY.*

The supreme court of California recently reversed a verdict as excessive on the ground that plaintiff's father was a laboring man.

The supreme court of Delaware has forbidden women to practice law in that state.

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Justice Lemon, of Brooklyn, has decided "that an engagement ring is not a gift, and that in case the engagement is broken the ring does not belong to the woman but to the man."

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A witness in a Texas court swore that all the oxen in his neighborhood were of the same color. Upon investigation it was found that the same pair passed the witness' house several times each day.

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The biggest bill of expenses any candidate at the New York election has filed so far is put in by Francis M. Scott, elected justice of the supreme court. He owns up to having paid $10,000 as a campaign assessment to Tammany Hall.

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Russia's penal statistics show that in the dominion of the Czar the woman criminals outnumber the men by nearly 50 per cent, just the contrary being the case in other countries. Most of the women criminals are unmarried, and the majorlty come from the laboring classes in the cities.—*Chicago Law Journal.*

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A Chicago couple who had apparently exhausted the blisses and privileges of a common law marriage decided to separate and therefore inserted an advertisement in one of the daily papers announcing

that they had divorced themselves by advertisement. The common law marriage has long been recognized by the courts, but it would seem, even in these days of legal and moral laxity, that common law divorces or divorces by advertisement would experience difficulty in securing judicial approval.—*Chicago Law Journal.*

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The supreme court of Illinois, in reversing the decision of the lower court in the case of Gilloch v. People, at the last term, decided that a hen house cannot be "burglarized." The appellant claimed the court erred in overruling the motion to quash the indictment, also that the indeterminate sentence act and parole law was unconstitutional. The supreme court ignores the question of the constitutionality of the indeterminate sentence act and parole law in its opinion, but reverses and remands the case owing to the failure of the lower court to quash the indictment. The point at issue was that under the statute the words "or other buildings" did not or could not include a chicken house. The most liberal construction of the statute would only allow a stable to come under that head. Gilloch was convicted of stealing two chickens valued at 60 cents, and sentenced to serve not less than a year in the penitentiary.—*Chicago Law Journal.*

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The famous McHugh Will Case was decided by the Wisconsin supreme court on the 22d inst. The court declares invalid the bequests for masses. The suit was brought by the heirs-at-law of the deceased to recover the property bequeathed to Bishop Messmer to to be used for masses for the repose of the soul of the deceased and certain of his relatives who had gone before him. The lower court in its findings came to the decision that the bequests to the Roman Catholic Bishop, of money to be used for masses for the repose of the soul of the deceased and other souls "is void for indefiniteness and uncertainty, and because there is no ascertainable beneficiary, but that the remainder of said bequests of $4,150—viz., the sum of $500 to be used and applied for the Catholic Orphan Asylum at Green Bay, Wis.—is valid."

The bequest of $4,150 was held by the lower court to fall into the seventh clause and hence to go to Bishop Messmer just the same.

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Perhaps the first instance of the admission of an X-ray photograph as evidence in the trial of a criminal ease in this state occured on the 21st inst., at Watertown, in the Haynes murder trial. The claim of the prosecution was that a 32-calibre bullet struck Allen, the victim, in the jaw, and that it split, one piece being deflected in the jaw and the other piece into the back of Allen's head. The defense claimed that the substance at the base

of Allen's skull was not a fragment of a 32-calibre bullet, but a complete 32-calibre bullet. To prove this claim, the defense produced an X-ray photograph of Allen's neck, showing the substance which resembles a bullet near the second vertebra at the base of the skull. Dr. Gilbert Cannon, of Watertown, made the photograph, and from his experiments, says that the bullet is not a 32-calibre bullet. Both sides argued for several hours over the admission in evidence of the photograph. Justice Wright, following, we believe, precedents in other states, allowed the photograph to be put in evidence, and the jury carefully examined it. Science has already recognized in the X-ray a valuable agent, and the law, being an equally progressive science, does not propose to be behind in making use of every proper means of ascertaining the facts in any given case.—*Albany Law Journal.*

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The annual meeting of the National Prison Association was held at Austin, Texas, this week. The session was a specially interesting one, and no part of the proceedings excited more interest and concern than the report of the Committee on Criminal Law Reform. The report stated that the progress of crime was absolutely frightful, and recommends that it would be most successfully checked by the following changes in the handling of criminals:

Greater security of punishment; doing away with all technicalities in trials; abolishment of juries; making conviction more summary and trial more speedy; depriving defendants of the right to appeal to a higher court; offering rewards for the discovery and conviction of criminals; sterilization of defectives, both moral and physical; abolishment of poverty; removing or restricting the power to pardon; prohibiting the use of intoxicating liquors; reconstruction of the ethical code of lawyers; curing inherent defects in the law, as distinguished from its enforcement; developing a scientific motherhood; state regulation of marriage; restricting immigration; popular education and colonization of criminals; the reformation of criminals by the abolition of the definite sentence.

The committee states that some of its suggestions are practically impossible at present, but if followed as closely as possible the morals of the country would be greatly improved and crime would be correspondingly decreased.—*Chicago Law Journal.*

## NOTES.

Dogs are property within the meaning of a state statute declaring railroads "responsible for all damage to property done or caused by the running of trains." *St. Louis S. W. Ry. Co.* v. *Stanfield, 8 American & English Railroad Cas. (N. S.) 115.*

In an action for damages for indecent assault, evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not. *Gross* v. *Brodrecht. Supreme Court of Canada.*

The changing by the payee of the date of a demand note, payable with interest, to a later date, is a material alteration and makes it void, though the effect of the alteration may be to benefit the maker by reducing the amount of interest chargeable against him. *Boulton* v. *Landmuir. Supreme Court of Canada.*

Where a railway company has sold a sleeping-car ticket to a point on its road where the passenger has to change cars in order to reach her destination, it is the duty of such company to awaken the passenger in sufficient time to allow her to dress, or, if it has failed to do so, to hold the train until she can dress in a manner suitable to make such change of cars; and the neglect of the company to perform such duty, resulting in damage to the passenger, is sufficient to authorize a recovery, even though the duty is not expressly prescribed in the contract of carriage. *McKeon* v. *Chicago, M. & St. P. Ry. Co., 8 American & English Railroad Cas. (N. S.) 219.*

Have persons aggrieved by the failure of railway companies to run their trains punctually according to their published schedules any legal remedy? This question is one of frequent recurrence; and in a recent number of the London Law Journal the English law upon the subject is thus concisely stated:

"The conditions of the contract of carriage incorporated by reference on tickets to the published time-tables, &c., of the company, where ambiguous, will be read against the company. In the earlier decisions on the subject the courts were disposed to treat the conditions as creating a contract to insure punctuality as far as practicable, and LeBlanche v. The London and Northwestern Railway Company, L. R. 1 C. P. Div. 286, 313, held that a person who was delayed by punctuality was entitled to take a special train and charge the costs as damages. But the companies can refuse to guarantee punctuality, and their present conditions are to this effect, with the result that the passenger is really without remedy. (Lockyear v. The International Sleeping Car Company, 61 Law J. Rep. Q. B. 501; McCartan v. The Northeastern Railway Company, 54 Law J. Rep. Q. B. 441). The result of these decisions appears to be that the tables are a mere representation as to the time *before* which a train will not start from or arrive at a particular station, but that there is no promise or contract to start or arrive at the times specified."—*Washington Law Reporter.*

In this country the promise amounts to no more than an undertaking to use reasonable diligence, and when a passenger has accepted the general offer by demanding a ticket, he becomes entitled to reasonable efforts being made on the part of the company to ensure punctuality.

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As to what constitutes a contempt of court is always of more than usual interest to the profession, because of its infrequency, and by reason of the important and generally new questions raised. A decision of much interest was recently handed down by the supreme court of Wisconsin in the case of the State v. Circuit Court of Eau Claire County, 72 N. W., 193.

In March, 1897, the circuit court of Eau Claire County was in session, Judge Bailey presiding in the trial of cases. Judge Bailey's term as judge was to expire in January, 1898. The election of his successor was to take place in April, 1897. Judge Bailey was a candidate for re-election. Two other candidates were in the field for the judgeship. The petitioner Ashbaugh was the editor and publisher of a newspaper in Eau Claire, and the petitioner Doolittle was a lawyer in the same city. Both petitioners were opposed to the re-election of Judge Bailey. On March 11 Doolittle published in Ashbaugh's paper an article in which he charged the judge with being extravagant in the management of the business of the court, with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. All of these charges referred to cases that had been decided, and not to matters then pending or on trial. On March 31 an editorial appeared in the same paper opposing the judge's candidacy and summarizing the charges against him which had been made in Doo-

little's article. April 1 Judge Bailey, on his own motion, made an order requiring Hayden & Frawley to commence contempt proceedings against Ashbaugh and Doolittle because of such publications. The same day a sworn petition was presented in which was set forth the facts of the publication of the articles, and alleging that Ashbaugh and Doolittle had circulated the articles among the officers of the court and people who had been summoned as jurors. Upon this petition an order was made requiring Doolittle and Ashbaugh to appear at 3 o'clock the same day and show cause why they should not be punished for the alleged contempt. An appearance was made by the gentlemen at the designated time, and they asked for further time, which was granted until half-past seven o'clock p. m. on the same day, at which time they filed an affidavit alleging the truth of the articles, and asked for further time in which to answer, but were denied. Interrogatories were then served upon them, and they were required to appear at 10 o'clock the next day. When that time arrived an alternative writ of prohibition from the supreme court was served upon Judge Bailey, whereupon he announced that he would not proceed further with the pending proceedings, but immediately made an order adjudging Ashbaugh and Doolittle in contempt in the immediate presence of the court because of their having filed their affidavit alleging the truth of the articles, and committing them to jail for thirty days, the imprisonment to commence at once. The commitment was placed in the hands of the Sheriff, but was not executed.

The question involved in the case was, whether the publication of the articles in question constituted criminal contempt. It was contended that the acts constituted at least constructive contempt, and several authorities were cited in support of that theory. But the cases cited all referred to actions or proceedings then pending and which were undecided. In the present case the articles referred only to the actions of the judge in the performance of judicial duties respecting former cases, and nothing was said or done that would tend to prejudice the cause of justice in the court or influence the then pending litigation, because it was not charged that the articles were brought into the immediate presence of the court. As to whether articles adversely commenting upon the acts of courts in cases which have been decided constitute contempt, there is some conflict of authority, but it is difficult to understand upon what grounds it is held that such publications constitute constructive contempt. It is maintained that such comments tend to lessen the respect due the courts, and indirectly impairs their usefulness. That such discussion diminishes the confidence of the people in the courts. But such reasoning is too mythical, and undoubtedly invades the great constitutional privileges and guarantees of freedom of speech and press which is one of the arch stones upon which was builded the fundamental principles of Government. The weight of authority is, happily, contrary to this view.

Mr. Justice Winslow, who wrote the opinion, said: "We are well persuaded that newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt,and our reasons for that conclusion will be briefly stated. Important as it is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiment on all subjects; also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action of law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office it would not be contended by any one that the publications in qnestion would afford ground for any other legal action than an action for libel in the regular course of law; but the claim is that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grivous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critics by imprisonment. The result of such a doctrine is that all unfavorable criticism of a sitting judge's past official action can be stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there be any more effective way to gag the press and subvert freedom of speech we do not know where to find it. Under such a rule the merits of a sitting judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment no such divinity as this 'doth hedge about' a judge; certainly not when he is a candidate for public office. * * * But another claim was made by the counsel who so ably represented Judge Bailey in this court which requires some attention. It appears by the return that immediately upon the service of the alternative writ upon him Judge Bailey announced that he would proceed no further with the pending proceedings, and that they were stayed. After making this announcement, however, the judge at once stated that a new contempt had been committed by Ashbaugh and Doolittle in the immediate presence of the court by the filing of their sworn return or affidavit in response to the original order to show cause, stating that the charges in the newspaper articles were true; that this contempt was independent of the alleged contempt by publication, and was not included within the inhibition of the writ, and that he would at once punish them for this contempt. Thereupon the judge proceeded to at once adjudge them guilty of this new contempt and sentenced them to imprison-

ment therefor. We are unable to agree with this contention. If, as we have held, the original publication was not contempt, and the attempt to punish it as such was in excess of the jurisdiction of the court, then certainly the defendants had a right when summoned into court to allege its truth. They were forced, if they were in any degree honorable men and not mere slanderers, to allege the truth of the publication. Any other course would demonstrate their pusillanimity. It cannot be endured that a court, by unauthorized summary proceedings, should wring from a man such a declaration and then abandon the original proceedings, and punish this forced declaration as contempt."—*The American Lawyer.*

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The supreme court of Michigan in Caldwell et al. v. Jones et al. has recently re-affirmed the rule that a married woman cannot make herself liable upon a note given jointly with her husband for the purchase of personal property by the two. Justice Montgomery speaking for the court says:

"It has been frequently held that the wife cannot become surety for the husband. It has also been held and is the established doctrine in this state that the wife is not liable generally for her engagements, nor can she make herself liable except by contract relating to her separate estate or by contract by which she acquires separate property. It is not enough to charge a married woman upon her executory contract that there is a consideration which would support a promise at the common law or that the contract indirectly insures to her benefit. Russell vs. Bank, 39 Mich., 671. In Spier vs. Offer, 73 Mich., 36 it was held that a wife could not be held liable upon a joint contract with her husband for improvements made upon property owned by them jointly. The court said, "She, the wife, has no power to contract except in regard to her separate property." So it was held in Artman vs. Ferguson, 73 Mich., 147, that the wife cannot be held liable for goods furnished to the husband and wife as partners. The court, speaking by Mr. Justice Long said, "The important and sacred relations existing between husband and wife which lie at the very foundation of civilized society are not to be disturbed and destroyed by contentions which may arise from such a community of property and joint power of disposal and mutual liability for the contracts and obligations of each other." See also Bassett vs. Sheperdson, 52 Mich., 3; Curtis vs. Crowe, 74 Mich., 99.

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In Livingston v. Bradford, decided by the supreme court of Michigan, it appeared that plaintiff was employed by the Commercial State Bank at St. Joseph. The bank had lost small amounts

at various times and plaintiff was suspected. The defendant, who was cashier, placed a fifty-cent piece under some papers, where the plaintiff worked, which disappeared. The defendant, in presence of Mr. Clark, the bookkeeper, charged the plaintiff with having taken this money. On the same day defendant telephoned the plaintiff's father but was unable to find him; but later in the evening plaintiff's father found defendant who told him about the missing money. Defendant stated to plaintiff's father: "Will (meaning plaintiff) has been tempted and has taken some money. A marked half dollar was placed under a paper for the purpose of catching him. I placed a quarter in a paper down by the waste basket, and that was never found. Will has taken the money." No one was present during this last conversation except defendant and plaintiff's father; and during the first conversation no one was present except the parties and Mr. Clark. The plaintiff brought an action for slander. The question was whether the statements made by defendant were privileged. The court by Chief Justice Long says:

"It is claimed by counsel for defendant that the communications made to the father and to Mr. Clark, upon which this action is founded were privileged.

Such communications, however, cannot be classed as absolutely privileges within the definition of that term, laid down by this court in Bacon vs. Mich. Cent. R. R. Co., 66 Mich., 166; but rather a qualified privilege, as there defined. The defendant communicated the facts to Mr. Clark and stated the matter to the plaintiff in presence of Mr. Clark. No one else was present. Mr. Clark was the bookkeeper of the bank. He had a right to know what the claim made by defendant was, as he, too, was interested in the safe keeping of the funds of the bank. The communication was also made to the father of the defendant. No other person was present. As was said in Bacon vs. Mich. Cent. R. R. Co., supra: "The question whether the occasion is such as to rebut the inference of malice if the communication be bona fide is one of law for the court; but whether bona fides exist is one of fact for the jury;" citing cases in support of the proposition, and among them, 1st Amer. Lead. Cases, 5 Ed., 193, where the rule is well stated. The communications to the father and Mr. Clark were privileged; that is, they were made on occasions and to such persons as rebut the prima facie inference of malice arising from the communication of matter prejudicial to the character of the plaintiff, and threw upon him the onus of proving malice in fact.

But counsel for plaintiff contends that the placing of the coins there was an effort on the part of the defendant to entrap the plaintiff and induce him to commit an offense, and that there was no justification or excuse for such conduct.

No motive was shown for placing the coins there, except that testified to by the defendant. He was cashier of the bank; had hired the plaintiff and could discharge him at any moment. It is

evident, therefore, that the coins were not placed there for the plaintiff to take and thus find an excuse for his discharge.

The plaintiff was eighteen years of age and apparently a young man of intelligence. He was handling the money of the bank every day, and must have known that whatever money was found behind the bank counter was the money of the bank. If he took the coin placed there by the defendant, he did so with full knowledge that it was a dishonest act. He must have known that he had no more right to it than to any of the moneys he was in the habit daily of counting. On cross-examination he testified on several occasions he had shaken dice for cigars, and upon one occasion had played a game of poker for money; and from his testimony it appears that he was familiar with the rules of the game. It does not appear that he spent very much money in gaming, but his wages were only four dollars per week. His conduct at least shows that he had intelligence enough to know what was right in the discharge of his duties at the bank.

The defendant was cashier of the bank. The duty rested upon him to see that the affairs of that corporation were fairly and honestly conducted. It was not unlawful, or even improper, if he suspected the plaintiff of peculation, to place those coins where he might know whether the plaintiff was in fact honest in the discharge of his duties there. Small losses of from twenty-five cents to a dollar and a half were occurring daily. They could not be accounted for. He claims to have suspected the plaintiff and placed these coins where, if taken, their loss would be at once discovered. It is evident someone took them. If the plaintiff took them, or the defendant had good reason to believe he took them, the plaintiff had no right to recover.

Counsel for defendant asked the court to charge the jury that they must find for defendant.

Under the record as it is returned here, we think that charge should have been given. The only question which could arise in the case is the bona fides of the defendant in making the statements to the plaintiff in presence of Mr. Clark and the communication to plaintiff's father. As we have seen, these communications were privileged; that is, the circumstances under which they were made rebut the presumption of malice, and throw upon the plaintiff the onus of proving malice in fact."

## DIGEST OF RECENT DECISIONS.

ABORTION.

Voluntary submission to treatment for the purpose of an abortion is held, in *Goldnamer* v. *O'Brien* (Ky.) 36 L. R. A. 715, to preclude any right of action against other persons for inducing and aiding the attempt. This is based on the general rule that the suit of a wrongdoer will be rejected when seeking redress for another's participation in the wrong.

BANKS.

A fictitious credit given by a bank to a nominal depositor by entering a credit in his favor and immediately canceling it by another entry showing that a check was drawn for the full amount of the credit, but when the pass-book of the depositor showed the credit only, is held, in *James* v. *Crosthwait* (Ga.) 36 L. R. A. 631, to make the banker liable to a person who sustained a loss by relying on the apparent credit, where he inquired of the banker as to it and was induced to believe that the entry in the passbook represented a real credit.

A cashier's check drawn by a banker upon himself "to the order of" another person is held, in *Henry* v. *Allen* (N. Y.) 36 L. R. A. 658, to constitute a negotiable instrument giving the rights of a bona fide holder to one who received it from an agent by mail in return for checks and drafts mailed to the agent for deposit.

Payments to a depositor during a run on a bank and after the cashier has persuaded some persons not to withdraw their deposits, but when the bank has assets sufficient so that its officers expect to continue the business and pay all debts, are held, in *Stone* v. *Jenison* (Mich.) 36 L. R. A. 675, to be lawfully made, and not to constitute an illegal preference to that depositor, although the run continues until the bank is forced to suspend.

A claim that a bank was bound to apply to the payment of a note which it held a deposit of the first indorser was denied in *First Nat. Bank* v. *Peltz* (Pa.) 36 L. R. A. 832, where the note was made for his accommodation so that he, and not the apparent maker, was, as between themselves, primarily liable upon it.

BILLS AND NOTES.

Presentment to all the makers of a note is held, in *Benedict* v. *Schmieg* (Wash.) 36 L. R. A. 703, to be necessary in order to hold an indorser, whether the note is joint in form or joint and several. The previous authorities on presentment to joint makers to hold indorsers of a note are compiled in the annotation to the case.

BICYCLES.

A license tax on a bicycle used for pleasure is held, in *Davis* v. *Petrinovich* (Ala.) 36 L. R. A. 615, to be unauthorized by a charter provision for a "vehicle license" to be imposed on vehicles used in the "transportation of goods and merchandise."

CARRIERS.

The regulation of a carrier for collecting fares or tickets on a suburban train which prohibits passengers from going past the conductor into the part of the train where he has completed his collection of fares unless they satisfy him that they have already paid fare is held, in *Faber* v. *Chicago Great Western R. Co.* (Minn.) 36 L. R. A. 789, to be a reasonable one which the conductor was justified in enforcing, even as against a passenger who had no previous notice of it.

The right of a carrier receiving blasting powder for transportation to insist upon such limitation of common-law liability as it sees fit is sustained, in *Cleveland Powder Works* v. *Atlantic & Pac R. Co.* (Cal.) 36 L. R. A. 648, on the ground that a common carrier is not obliged to receive and transport such dangerous articles. Annotation to the case reviews the other authorities on the limitation of carrier's liability and duty in case of dangerous articles.

For baggage left on a depot platform by a passenger who arrived at the place after 11 o'clock at night, when there were no conveyances running by which he could take it away, the carrier was held, in *Kansas City Ft. S. & M. R. Co.* v. *McGahey* (Ark.) 36 L. R. A. 781, to be liable only as a warehouseman, and not as a common carrier, if the baggage was burned during the night.

CONFLICT OF LAWS.

The offspring of a bigamous marriage contracted in Illinois, where it is void, are held, in *Leonard* v. *Braswell* (Ky.) 36 L. R. A. 707, to be entitled to inherit lands in Kentucky, where the parents live, by virtue of the Kentucky statute legitimating the issue of the marriage.

An agreement not to be performed within one year, though made in another state or country where it could be proved by parol evidence, is denied enforcement in *Heaton* v. *Eldridge* (Ohio) 36 L. R. A. 317, because the statute of that state allows an action on such contract only when it is in writing.

The validity of a covenant made in North Carolina, where the parties are domiciled, by a married man, to surrender all his marital rights in his wife's land in Massachusetts in consideration of her release of dower in his land after she had been made a free trader, is held, in *Polson* v. *Stewart* (Mass.) 36 L. R. A. 771, to be governed by the law of North Carolina.

CONSTITUTIONAL LAW.

A statute requiring the destruction of peach trees attacked by the yellows, is held, in *State* v. *Main* (Conn.) 36 L. R. A. 623, to be within the discretion of the legislature as an exercise of the police power.

CONTEMPT.

The power of a notary public to commit a witness for contempt in refusing to be sworn or give a deposition is denied in *Re Huron* (Kan.) 36 L. R. A. 822, and a statute purporting to confer such power upon a notary is held void.

CONTRACTS.

The rule that death terminates an executory contract when the peculiar skill or taste of the party who dies is essential to the completion of the contract is held in *Cox* v. *Martin* (Miss.) 36 L. R. A. 800, to be inapplicable to the case of a deed of trust covering crops to be grown and some other personal property, although it was necessary for the other party to make advances and complete the crop.

COTENANCY.

The right of a tenant in common who is also a lessee of his cotenant to compensation for improvements made by him, enhancing the value of the property, and made with the knowledge but without the consent of the cotenant, is denied in *Cosgriff* v. *Foss* (N. Y.) 36 L. R. A. 753, when their effect was not to protect or preserve the property but to aid the business of the tenant, and the increased income was not shared with the cotenant.

DAMAGES.

The measure of damages for failing to deliver a building to a tenant as agreed is held, in *Jonas* v. *Noel* (Tenn.) 36 L. R. A. 862, to be the difference between the rent provided for and the value or rental value, rather than the market value of the property, where the building was to be erected for the tenant and was of such unprecedented size that no one but the tenant would be likely to make it serviceable in his business.

EVIDENCE.

As the law presumes sanity, it is held, in *State* v. *Scott* (La.) 36 L. R. A. 721, that an accused person who urges his insanity as a defense has the burden of proving it. The great number of cases on the presumption and burden of proof as to sanity are compiled in the annotation to the case.

An order for the production in court for analysis by experts and physicians of a specimen of the urine of plaintiff who testified he is suffering from albumen and sugar in the urine as the result of an injury, is held proper, in *Cleveland, C. C. & St. L. R. Co.* v. *Huddleston* (Ind.) 36 L. R. A. 681; especially when he has voluntarily produced a specimen for his own counsel which has been analysed by physicians selected by them and proof thereof offered in court.

GARNISHMENT.

Concurrent jurisdiction in the courts of different states for the garnishment of a foreign corporation which is doing business in each state by agents is held, in *Lancashire Ins. Co.* v. *Corbetts* (Ill.) 36 L. R. A. 640, to exist, and it is held that the jurisdiction is not determined by the situs of the debt, but by the liability of the garnishee to be sued at the place.

GAS.

Escape of gas from a cracked elbow in a pipe which a gas company puts in, after repeated attempts to repair it and the assurance of its employee that it is all right, is held, in *Richmond Gas Co.* v. *Baker* (Ind.) 36 L. R. A. 683, to render the gas company liable for the resulting damages, where the persons were lulled by such assurances into a feeling of security, although able to smell the gas.

LANDLORD AND TENANTS.

A landlord is not exonerated from responsibility for the safe condition of an elevator in a building a portion of which is leased where he retains the general control over the elevator and its approaches and expressly covenants that he will keep them in good condition, although the tenant and other tenants have the right to use it in common with the landlord. *Olson* v. *Schultz* (Minn.) 36 L. R. A. 790.

MASTER AND SERVANT.

The manner of delivering messages to railroad employees is held, in *Card* v. *Eddy* (Mo.) 36 L. R. A. 806, not to constitute a part of the master's duty so as to make him liable for injuries to an employee for negligence of another who delivered the message intrusted to him by attaching it to a weight and throwing it from a moving train.

MUNICIPAL CORPORATIONS.

The right to lay a private sewer in the streets of a city is held, in *Stevens* v. *Muskegon* (Mich.) 36 L. R. A. 777, to be one which the city could grant by contract, and when a sewer had been constructed in accordance therewith, it was held that a vested right was obtained to its use.

NEGLIGENCE.

For the loss of the fingers of a little child who puts her hand up the spout of a coffee grinder in a store or shop, while there with her father to make a purchase, it is held, in *Hoolbrook* v. *Aldrich* (Mass.) 36 L. R. A. 493, that the shopkeeper is not liable.

NUISANCES.

An ordinance absolutely prohibiting a railroad company from inclosing its track in the platted portions of the city, and providing that such inclosure shall be a nuisance, was held, in *Grossman* v. *Oakland* (Or.) 36 L. R. A. 598, to be void, although the city charter confers power to prevent and restrain nuisances, and declares what shall constitute a nuisance. Annotation to this case reviews the numerous authorities on the power of municipalities to define, prevent, and abate nuisances.

RAILROADS.

For fire communicated from a cooking car owned by an independent contractor engaged in cutting wood for a railroad company, it is held, in *Leavitt* v. *Bangor & A. R. Co.* (Me.) 36 L. R. A. 382, that the railroad company is not liable, although it had placed the car on a spur track for the use of the contractor.

RELEASE.

The fact that a woman injured in a railway car was stunned, and after recovering consciousness was still dazed and nervous when a release of damages presented to her in a hospital was signed by her without reading, is held, in *Och* v. *Missouri K. & T. R. Co.* (Mo.) 36 L. R. A. 442, insufficient to avoid the release, although it was obtained by misrepresenting to her its contents.

A conveyance to a railroad company, releasing all damages sustained or which shall be sustained by reason of the "construction, building, or use" of the railroad, is held, in *Fremont, E. & M. V. R. Co.* v. *Harlin* (Neb.) 36 L. R. A. 417, insufficient to preclude the grantor from recovering damages for the negligent maintenance and operation of the road; but the release is treated as equivalent in this respect to a judgment of condemnation.

REVIEW.

The interest necessary to give a standing to maintain a bill of review of a foreclosure suit, which does not appear on the record of that suit, is held, in *Thorington* v. *Thorington* (Ala.) 36 L. R. A. 385, to be improperly introduced into a bill of review when it is based on matter which existed at the time of the decree, but was not brought forward before its rendition.

STREET RAILWAYS.

An ordinance requiring proper and suitable fenders on the front of electric cars to prevent accident, and making it unlawful to operate them in the streets without such fenders, is held, in *State, ex rel. Cape May, D. B. & S. P. R. Co.* v. *Cape May* (N. J.) 36 L. R. A. 653, to be a valid exercise of the power to regulate the use of the streets.

TELEGRAMS.

The right of a telephone company to require a telegraph company to place a telephone instrument in its office for use in receiving and transmitting messages on the ground that it has allowed another telephone company to have an instrument there for that purpose is denied, in *People, ex rel. Cairo Telephone Co.* v. *Western Union Telegraph Co.* (Ill.) 36 L. R. A. 687, on the ground that the telegraph company cannot be compelled to receive oral messages and that by waiving its rights in that respect in favor of one company it is not compelled to do so in favor of another.

TAXES.

A foreign corporation which is a special partner in a limited partnership within the state acting as sole agent for the corporation in this country is held, in *People, ex rel.* v. *Roberts*, (N. Y.) 36 L. R. A. 756, to be doing business within the state for the purpose of tax on capital stock employed in the state.

The FIFTH ANNUAL MEETING of the ASSOCIATION OF JUDGES OF MICHIGAN will be held at Lansing, commencing Tuesday, December 28, 1897, at 1:30 P. M.

Sessions held in the Supreme Court Room.

# PROGRAM.

## TUESDAY, DECEMBER 28, 1897.

1:30 P. M.

Address by the President, - - - - -
JUDGE GEORGE S. HOSMER, Detroit.

A Legal Anomaly, - - - - -
JUSTICE FRANK A. HOOKER, of the Mich. Supreme Court.

The Pardoning Power and its Limitations, - - -
HON. CHARLES L. RARDEN, Greenville.

Experiences upon the Bench, - - - -
JUDGE EDWIN A. BURLINGAME, Grand Rapids.

Reports of Committees.

## WEDNESDAY, DECEMBER 29, 1897.

9:30 A. M.

The Bench as Viewed from the Bar, - - - -
HON. EDWARD CAHILL, Lansing.

The Relation of the Bar to the Bench, - - -
HON. MARTIN V. MONTGOMERY, Lansing.

Election of Officers.

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